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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

RATEPAYERS FIGHT BACK

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.
ARKANSAS POWER & LIGHT CO.
ARKANSAS PUBLIC SERVICE COMMISSION
ATTORNEY GENERAL OF ARKANSAS

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment

and opinion of the Court of Appeals entered on August 23, 1985.

QUESTIONS PRESENTED

1. Does the Arkansas Public Service Commission share concurrent jurisdiction with the Securities and Exchange Commission to regulate securities and debt issued or executed by the Arkansas Power and Light Company?

2. Can action by the Federal Energy Regulatory Commission preempt the jurisdiction of the Arkansas Commission to so regulate?

3. Does the Commerce Clause prohibit regulation by the Arkansas Commission of such securities and debt?

4. Should the courts below have abstained from hearing this case under

doctrines concerned with premature federal interference with state proceedings?

5. Did the courts below lack jurisdiction to hear this case pursuant to the "well-pleaded complaint" rule?

PARTIES

The three commissioners of the Arkansas Public Service Commission also were parties to the proceedings below. They are: Robert E. Johnston, Patricia S. Qualls, and James W. Daniel.

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OPINIONS AND ORDERS BELOW

The opinions of the courts below appear in the Appendix hereto. Their citations are: 772 F.2d 404 (8th Cir. 1985) and 593 F.Supp. 363 (E.D. Ark. 1984). Also included in the Appendix is the Order to Appear and Show Cause, issued to Arkansas Power and Light Company on August 1, 1984 by the Arkansas Public Service Commission in Docket No. 84-190-U.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 23, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth verbatim in the Appendix hereto. The citations are as follows: U. S. Const., Art. I., § 8, cl. 3; Federal Power Act, 16 U.S.C. §§ 824(a) & (b), 824c(f), 824d(a), and 825q; Public Utility Holding Company Act, 15 U.S.C. §§ 79a(b)(1), 79a(c), 79b(a)16, 79f(a) and (b), 79g(a), (b) & (g), and 79u; Ark. Stat. Ann. §§ 73-238, 73-254, and 73-255.

STATEMENT OF THE CASE

I. Course of Proceedings Below

The plaintiff in this case was Middle South Energy, Inc. ("MSE"), a generating subsidiary of a public utility holding company, Middle South

Utilities, Inc. ("MSU"). Another MSU subsidiary, the Arkansas Power and Light Company ("AP&L"), became a plaintiff-intervenor.

On August 31, 1984, MSE filed in the district court a complaint and petition for declaratory judgment and injunctive relief and a motion for a temporary restraining order. Defendants were the Arkansas Public Service Commission ("APSC") and its three commissioners. The purpose of the suit was to enjoin the APSC from conducting further proceedings in its Docket No. 84-190-U ("show-cause docket").

The district court granted an APSC motion to consolidate hearing of the preliminary injunction with the trial on the merits. The court recognized Ratepayers Fight Back ("RFB")[1] and the

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[1]RFB is a consumer coalition that had been recognized as a full party in

Attorney General of Arkansas as defendant-intervenors. Presiding Judge Henry Woods issued a Temporary Restraining Order, later made a Permanent Injunction on September 14, 1984, enjoining the APSC from taking further action in its show-cause docket.

The defendants and defendant-intervenors brought timely appeals to the Court of Appeals. On August 23, 1985, a three-judge panel affirmed the decision of the district court, but on different grounds. The APSC filed a timely request for rehearing, which was supported by RFB. The request later was withdrawn by the APSC by agreement with MSE and AP&L.

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the APSC show-cause docket.

The district court below apparently asserted jurisdiction under 28 U.S.C. 1337 and the Federal Power Act, 16 U.S.C. §§ 824 et seq.

II. Factual Background

The facts in this case are extensive and complex. To begin, MSU is a holding company registered under the Public Utility Holding Company Act of 1935. MSU's subsidiaries include four operating companies -- AP&L, Louisiana Power and Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L"), and New Orleans Public Service, Inc. ("NOPSI") (collectively the "system companies"). Other subsidiaries include the generating company, MSE, and a service company, Middle South Services, Inc. ("MSS"). (R. 78).[2]

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[2]In this petition, citations to the Clerk's Record will be made as R. ____; to the Trial Exhibits as Ex. ____; and

The system companies are public utilities subject to state regulation in the states where they operate. Their systems are interconnected, and they pool their power. Each company sells power to retail customers and buys power at wholesale from the others. (Ibid).

The wholesale transactions are governed by the System Agreement (Ex. 191) which is approved by the Federal Energy Regulatory Commission ("FERC"). (Ex. 169). The retail transactions are governed by state law and the decisions of state utility commissions, such as the APSC. (See, e.g., Ark. Stat. Ann. § 73-201 et seq.). Financing transactions of MSU and its subsidiaries must be approved by the Securities and

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to the Trial Hearing as T. ____).

Exchange Commission ("SEC"), and such transactions of the system companies must comply with applicable state laws. (See, The Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79f(a) and 79g(g)).

In 1974, MSE was created to finance and construct a nuclear-powered generating plant in Mississippi known as the Grand Gulf Project (the "Project"). (Ex. 5). To secure initial financing, MSE and the system companies entered into the Availability Agreement, dated June 21, 1974. (Ex. 12).

The Availability Agreement stated that MSE and the system companies would "join in executing such document or documents as may be necessary for MSEI to become a party to the System Agreement." (Ex. 13, Section 3). The

Agreement made the system companies liable for Project costs even if the plant never operated (Ex. 14, Section 5) and liable for all costs associated with a permanent shut-down of the Project. (Ex. 13, Section 4).

The system companies agreed to fulfill their obligations to MSE under the Agreement whether or not MSE ever received necessary governmental authorizations to fulfill its obligations under the Agreement or the System Agreement, and whether or not MSE actually <u>did perform</u> such obligations. (Ex. 15, Section 7).

If MSE had become a party to the System Agreement and ultimately sold the Project's power to the system companies under its terms, then the share of power for each company would have fluctuated from year to year. (Ex. 18).

MSE and the system companies submitted the Availability Agreement to the SEC for approval as a financing agreement. It was so approved on June 4, 1974 (Ex. 1729). In its order, the SEC took note "that the existing System Agreement has been accepted for filing with the Federal Power Commission..." and "that in order to permit participation by MSEI in the System Agreement, an amendment thereto will be filed with the FPC at an appropriate time." (Ex. 1732). No such amendment nor the Availability Agreement itself were ever filed for approval with the FERC. (T. 23).

In the Second Amendment to the Availability Agreement, MSE and the system companies changed course by agreeing either to execute a separate Power Purchase Agreement to govern sales

from the Project or go ahead with the original plan to make MSE a party to the System Agreement and sell power under its terms. (Ex. 25, Section 3).

This Second Amendment was submitted to the SEC for approval along with other financing transactions. (Ex. 1750). Included in the amendment was a provision to allocate costs from the Project according to the following fixed percentages: AP&L, 17.1%; LP&L, 26.9%; MP&L, 31.3%; and NOPSI, 24.7%. (Ex. 27, Section 4). This allocation, however, was not binding on the parties as to any subsequent wholesale rate submission to the FERC. (R. 137).

The fixed percentages required the consent of the banks and bondholders who were providing funds to finance the Project. (R. 135). The Second

Amendment retained the provisions requiring the system companies to pay the financing costs of the Project even if power from it was not made available to them. (Ex. 28).

As part of the original MSE application to the SEC, (1) MSU agreed to purchase 40,000 shares of MSE stock, (2) MSE and MSU entered into a Capital Funds Agreement, pursuant to which MSU would provide certain funds to MSE for Project construction, and (3) MSE entered into a Bank Loan Agreement with fourteen banks in order to borrow up to $308.5 million. (Ex. 1730). These transactions and agreements, along with the Availability Agreement, were approved by the SEC on June 4, 1974 (Ex. 1729). MSE witness Mr. Lupberger has stated the following about them:

> These agreements provided the banks with the assurance that MSE would receive sufficient equity capital to finance and operate the Grand Gulf Plant on a financially sound basis.... Because of the banks' reliance on the Capital Funds Agreement and the Availability Agreement as conditions for the Bank Loan Agreement, these agreements were integral parts of the initial financing plan for MSE.

(R. 132-33).

Since the 1974 approval of the initial financing transactions, MSE and the system companies have returned to the SEC to secure permission to amend the Bank Loan Agreement, execute new agreements for bank loans, supplement the Capital Funds Agreement, issue first mortgage bonds, and assign the rights of MSE under both the Availability Agreement and the Capital Funds Agreement to the various creditors who were financing the Project. (See, Ex. 1734-59, 1767, 1775-82).

In each instance, the banks relied on the Availability Agreement and the Capital Funds Agreement as security for the debt of MSE. AP&L, by signing and executing the Availability Agreement and its Amendments, became liable to pay a share of MSE's financing costs. But the Arkansas utility neither sought nor received approval from the APSC to execute such indebtedness. (Ex. 189).

In June of 1977, creditors of the Project began requiring MSE and the system companies to issue further indebtedness. (R. 129). Such issues came in the form of Assignments of the Availability Agreement and Assignments of the Capital Funds Agreement. They were executed with each issuance of first mortgage bonds and with each amended and restated bank loan agreement.

When MSE needed more debt financing of the Project, it and the system companies issued a new assignment as collateral security.

The Assignments provided additional security for the punctual payment of bank notes and for the satisfaction of bond purchasers. (Ex. 508-09, Section 1.1). This took the form of MSE, with the formal consent of the system companies, assigning its rights to receive payments under the Availability Agreement to the creditors should an Event of Default occur. The effect was to give the banks and bondholders the right to recover their financing advances in the Project directly from the system companies. (Ex. 508-11, Sections 1.1 - 1.4). The assignments required SEC approval to be effective. (Ex. 508, Section H).

The assignments specifically recognized that the Availability Agreement, when approved by the SEC, could remain in effect as a financing transaction, even if disapproved by the FERC as a wholesale rate. (Ex. 514, Section 2.2(b)). Section 4 of the Availability Agreement set forth a scheme whereby the system companies might receive power from MSE via the terms of the System Agreement. This constituted the "purchase power" portion of the Availability Agreement, which was subject to FERC approval to become effective as such. (Ex. 514, Section 2.2(d)). As noted above, such FERC approval was neither sought nor given.

In Section 2.2(c) of the assignments, the system companies agreed that all amounts paid by each company pur-

suant to the Availability Agreement would constitute Subordinated Indebtedness of MSE. (Ex. 514). That term meant indebtedness subordinated and junior in right of payment to the obligations of MSE to its creditors. (Ex. 512).

The effect on the system companies was to require them to pay off the debt of MSE, even if no power was received, and to become subordinated to the primary creditors of MSE. Moreover, the system company obligations were absolute and unconditional. (Ex. 515, Section 2.2(d)).

The indebtedness issued by AP&L through execution of the Assignments, with all of their "hell or high water" and "take or pay" provisions, were never

submitted to and approved by the APSC prior to their execution or thereafter. (Ex. 189).

On July 21, 1980, the chief executive officers of the system companies signed a Memorandum of Understanding whereby they agreed that AP&L should have a zero allocation of costs from the Project. (Ex. 714). This memorandum was memorialized in the Reallocation Agreement of July 28, 1981. (Ex. 34). The latter agreement purported to "hold AP&L harmless" from any obligations it might be asked to fulfill pursuant to the Availability Agreement, its Assignments, or the Power Purchase Advance Payment Agreement. (Ex. 36, Section 3). LP&L, MP&L and NOPSI agreed to indemnify AP&L by fulfilling its obligations to MSE. (Ex. 35, Section 1).

The Reallocation Agreement did not purport to indemnify AP&L for any obligations to pay for power from the Project as might be ordered by the FERC. Additionally, the Reallocation Agreement did not amend in any way the Availability Agreement and its Assignments, which remained intact. (Ex. 7).

MSE and the system companies submitted the Reallocation Agreement to the SEC, which approved it. (See, Ex. 91). In FERC Docket No. ER 82-616-000, the Grand Gulf allocation case, the Arkansas Attorney General asserted that SEC approval of the Reallocation Agreement, with a zero liability for AP&L, preempted FERC review of alternate allocations. (Ibid). The administrative law judge in that case replied: "The argument is without merit. The authority of

the SEC and this Commission are not in conflict. The SEC has sole jurisdiction over MSE's financing transactions and, as explicitly recognized by the SEC (Ex. 2), FERC has exclusive jurisdiction over the approval of the allocation of Grand Gulf...." (Ibid). The law judge did not treat the Reallocation Agreement as a wholesale rate, but instead viewed it as an agreement to facilitate financing.

In 1982, MSE and the system companies formally made their choice as to either filing an amendment to the System Agreement with the FERC or filing a separate Power Purchase Agreement that would govern sales from the Project. They chose the latter in the form of the Unit Power Sales Agreement ("UPSA"). (Ex. 39). It did not adopt or in any way incorporate the allocations pre-

viously set forth in the Availability Agreement for financing purposes.

Pursuant to this new purchase agreement, the system companies other than AP&L agreed to buy power from the Project according to these percentages:

	Unit No. 1	Unit No. 2
LP&L	38.57%	26.23%
MP&L	31.63%	43.97%
NOPSI	29.80%	29.80%
	100.00%	100.00%

(Ex. 40).

AP&L was a signatory to the agreement "solely for the purpose" of consenting to the terms and provisions thereof and would have "no rights or obligations" thereunder. (Ex. 44, Section 14). No purchaser could refuse to make payments under the agreement as a means of obtaining repayment for money paid to MSE under any of the financing agreements discussed previously. (See,

Ex. 43, Section 7). Additionally, the agreement contained no "take or pay" or "hell or high water" conditions, as was the case with the financing agreements. Rather, it was an agreement for the sale and purchase of power when and if such power was available from the Project, subject to necessary regulatory approvals. (Ex. 42, Section 2).

The UPSA was accepted for filing as a wholesale rate by the FERC on August 25, 1982. (Ex. 163).

On February 3, 1984, FERC Administrative Law Judge Ernst Liebman issued his Initial Decision Concerning Sales of Power From the Grand Gulf Nuclear Generating Plant, Docket No. ER 82-616-000. (Ex. 46). At the outset, that decision stated:

> This case involves an agreement to sell electricity from a nuclear generating plant. The broad issue is

> whether a Unit Power Sales Agreement providing for the sale of the nuclear power is just, reasonable and not unduly discriminatory within the meaning of the Federal Power Act. 16 U.S.C. 824 et seq.

(Ex. 48).

The Liebman decision never mentioned, nor in any way suggested, that any of the financing agreements concerning the Project were before the jurisdiction of the FERC.

In his decision, Judge Liebman did mention the Availability Agreement, e.g.:

> ...As a result, in 1974 MSE was established to facilitate the financing of Grand Gulf, and MSE acquired from MP&L all of MP&L's right, title and interest in the Grand Gulf project. ...To obtain a construction permit from the Atomic Energy Commission and initial construction financing, all four Middle South operating companies, including AP&L, entered into an Availability Agreement with MSE which required each company to put their credit support behind the Grand Gulf

> project. All four operating companies, including AP&L, are still financially liable for Grand Gulf costs in proportion to the specific percentages set forth in the Second Amendment to the Availability Agreement.

(Ex. 63, citations to record omitted).

Citing Sections 206(a) and (b) of the Federal Power Act, 16 U.S.C. § 824e(a), Judge Liebman found that the FERC could assert authority over the Unit Power Sales Agreement (Ex. 85). Ultimately, he modified the agreement as proposed, so that the allocation percentages became as follows:

	Unit 1
AP&L	36%
LP&L	14%
MP&L	33%
NOPSI	17%

(Ex. 95-96). The law judge then refused to allocate power and energy from Unit 2 of the Project at this time, stating:

"The rationale today for making an allocation today of Unit No. 2 may not be valid when the Unit is completed; a different allocation based on a different rationale may then be appropriate." (Ex. 96). He made this decision on Unit No. 2 even though the Availability Agreement and the Reallocation Agreement contained fixed allocations for the Unit that had received SEC approval for financing purposes.

The above-mentioned wholesale power allocation later was approved by the full FERC. Middle South Energy, 31 F.E.R.C. ¶ 61, 305 (1985).

On August 1, 1984, after conducting a formal investigation, the APSC established Docket No. 84-190-U, through an Order to Appear and Show Cause. (Ex. 184). The order was

directed to AP&L to "show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held to be void ab initio as a matter of law." (Ex. 189). The Commission listed thirty-six agreements which were to be the subject of its show-cause hearing. (Ex. 184-88). The Reallocation Agreement and the Unit Power Sales Agreement were not so listed. Neither of the latter agreements contained obligations agreed to by AP&L to pay costs associated with the Project, and the UPSA was a proposed wholesale rate before the FERC for approval. Some of the agreements listed were not executed by AP&L, but many of them defined the nature and amount of obligations incurred by AP&L.

The agreements that were listed in the show-cause order included the Availability Agreement and its Amendments and Assignments, the Capital Funds Agreements and their Assignments, and the various Bank Loan Agreements and their Amendments. In its order to show-cause, the APSC concluded "that the obligations purportedly imposed upon AP&L by some or all of the [thirty-six] agreements constitute prima facie violations of Ark. Stat. Ann. §§ 73-238, 253, & 255 (Repl. 1979)." (Ex. 189, emphasis supplied). The Commission also stated that AP&L had never sought nor received the authorization of the APSC to assume any share of the indebtedness of MSE. (Ex. 189).

AP&L filed a motion with the APSC urging dismissal of the show-cause pro-

ceeding. (Ex. 1643 - I). The motion denied that the APSC had jurisdiction over any of the thirty-six agreements, that they constituted an evidence of indebtedness, contract, lease or rental as those terms are used in Ark. Stat. Ann. §§ 73-238, 253 or 255, or that AP&L violated any state law by executing certain of the agreements without APSC approval. (Ibid). AP&L did not allege any harm, irreparable or otherwise, to itself or MSE in its motion to dismiss.

In a ten-page order dated August 31, 1984, the Commission denied AP&L's motion to dismiss. (Ex. 1634). The order stated that the Commission had "the statutory authority and jurisdiction to review the agreements in question." (Ex. 1637).

In his testimony filed in the show-cause docket, MSE witness Edwin Lupberger stated that APSC action to invalidate the Project's financing agreements would have no effect on an FERC-approved wholesale rate to allocate power from the Project. (R. 140).

REASONS FOR GRANTING THE WRIT

This case is one of first impression, and it will offer this Court an opportunity to preserve the carefully-balanced scheme of regulation of utility holding companies in existence since 1935. The courts below would radically transform that scheme into one excluding the state role presently set forth in federal law. Only Congress, if anyone, should be so bold.

In essence, the APSC sought to exercise its concurrent jurisdiction with the SEC to regulate financial agreements executed by a subsidiary of an electric utility holding company. That subsidiary, AP&L, is subject to APSC jurisdiction under Arkansas law. The district court, even though the agreements were approved by the SEC and never even submitted to the FERC for approval, held they were subject to exclusive FERC jurisdiction. In fact, the district court went so far as to hold that <u>any</u> agreements "integrally related" to a wholesale electric power project are subject to exclusive FERC jurisdiction and that any other agreements "essential to" the project are beyond state control.

The Court of Appeals tried a different approach by finding that state regulation of the agreements would place an impermissible burden on interstate commerce. Both courts were willing to render their judgments even though the APSC had not held hearings or issued a final order in its show-cause docket.

If the court below is not reversed, then a precedent will be set to allow subsidiaries of utility holding companies to escape state regulation with impunity and in direct contradition to the purposes of the Public Utility Holding Company Act of 1935.

I. The Decision Below Conflicts With Key Provisions of the Public Utility Holding Company Act of 1935.

The Holding Company Act, 15 U.S.C. § 79, et seq., expressly protects the

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I. The Decision Below Conflicts With Key Provisions of the Public Utility Holding Company Act of 1935.

The Holding Company Act, 15 U.S.C. § 79, et seq., expressly protects the

jurisdiction of states to regulate securities issued by subsidiaries of electric utility holding companies. In Sections 79a(b) and (c) of the Act, Congress sets forth a strong policy statement as to the "evils" of holding companies that can adversely affect the national interest, investors, and consumers. One such evil entails the issuance of securities "...without the approval or consent of the states having jurisdiction over subsidiary public-utility companies...." Id., § 79a(b)(1). The declared policy of the Act is to eliminate the evils cited. Id., § 79a(c).

In Section 79f(a), the Act makes it unlawful for a holding company or subsidiary company thereof to issue or sell any securities without SEC approval, unless otherwise exempted by the Act.

One exemption applies when a subsidiary company, having received expressed authorization by the appropriate state commission, issues the security for the sole purpose of financing its own business operations. Id., § 79f(b).

Sections 79g(a) & (b) of the Act require a holding company or subsidiary thereof to file for approval with the SEC a declaration that proposes the security to be sold. According to Section 79g(g), compliance with state law is a condition that must be met prior to a declaration becoming effective. Such requirement applies to all securities issued.

The term "security" is broadly defined by Section 79b(a)(16) to include "... any note, draft, stock, treasury stock, bond [or] debenture ..." and any

"... guaranty of, [or] assumption of liability on ..." any of the foregoing. (Emphasis supplied).

Section 79u states that nothing in the Act shall affect the jurisdiction of any state commission over any person, security or contract, insofar as such jurisdiction does not conflict with any provisions of the Act.

Middle South Utilities, Inc. is a holding company registered under the Public Utility Holding Company Act. Arkansas Power and Light Company is a subsidiary of MSU.

The Arkansas Public Service Commission regulates AP&L pursuant to Act 324 of 1935, Ark. Stat. Ann. § 73-201 et seq. Such regulation includes the authority to control the issuance and sale of securities.

Specifically, a utility such as AP&L may not "issue stock, bonds, notes or other evidence of indebtedness" without prior APSC approval. Id., § 73-255. Any such security made without APSC approval shall be void. Ibid. The APSC may initiate court or other proceedings as may be effective to release a utility from any contract made in violation of the Act. Id., § 73-238.

In 1979, the Supreme Court of Michigan decided issues remarkably similar to those of the instant case. Indiana and Michigan Power Co. v. State of Michigan, 275 N.W.2d 450 (Mich. 1979). In that case, a subsidiary of an electric utility holding company challenged the jurisdiction of the Michigan Public Service Commission to regulate security issuances of the subsidiary.

The subsidiary, Michigan Power Company, was organized solely to construct and operate a nuclear generating plant. It was to sell power wholesale from the plant to its parent, Indiana and Michigan Electric Company. The parent sold power at retail and wholesale and was itself owned by American Electric Power Company, Inc., a public utility holding company. The holding company parent owned operating companies in seven states. Their operations were physically interconnected and coordinated as a single, integrated electric utility system. Power purchases from the nuclear project were to be regulated by the Federal Power Commission (now FERC).

In challenging state jurisdiction, the subsidiary argued that regulation by

the SEC of the securities or regulation by the FPC of the wholesale power rate preempted state authority. The Court held:

> The Holding Company Act also, we are convinced, contains a clear expression of Congressional intent not to remove from the states power over the securities of local subsidiary operating companies as exercised through the state public service commissions. State commissions have not been divested of all jurisdiction over the securities of these companies. Rather, a partnership of concurrent state-federal control has been created.

Id. at 454. The Court so held even though the securities had been "subject to thorough SEC regulation." Id. at 455.

As to possible preemption under the Federal Power Act, the Court said: "...we find no Congressional intent to preempt the states in this area in the

Federal Power Act which granted rate jurisdiction to the FPC." Id. at 455. Finally, the Court rejected any notion of preemption under the Commerce Clause. Id. at 456.

The case law does not abound with decisions on issues similar to those in Michigan Power Company. Utilities are likely intimidated by the clear language of the Holding Company Act. It can only be construed as preserving the jurisdiction of states to regulate the securities of utilities within their borders. As cited above, Arkansas law clearly grants such jurisdiction to the APSC. When AP&L issues securities solely to finance its own business, the APSC regulates them. When AP&L issues securities to finance the business of its parent holding company system, both

the APSC and the SEC regulate them. "The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation -- not to supplant it." Alabama Electric Cooperative v. SEC, 353 F.2d 905, 907 (D.C. Cir. 1965).

A narrow exception to the general rule concerning state jurisdiction was carved out in Great Lakes Transmission Company v. Michigan Public Service Commission, 180 N.W.2d 59 (Mich. Ct. App. 1970). In it, the state commission attempted to regulate the securities of a natural gas pipeline company (a) which was not registered to do business in Michigan, (b) whose operations were restricted to the transportation of gas and in no way were regulated by the state commission, (c) which made no gas

sales to retail customers in Michigan, but only transported gas in interstate commerce, and (d) whose facilities were regulated by the FERC. Since the pipeline company was a subsidiary of a utility holding company, its securities were regulated by the SEC. Stressing the unique interstate character of the pipeline company, with its operations not otherwise regulated by the state commission, the Michigan court held narrowly:

> In summary, the Michigan Public Service Commission has no jurisdiction to regulate the issuance of securities by a corporation such as Great Lakes, engaged in the transmission of natural gas in interstate commerce where no sales thereof are made directly to consumers.

Id. at 64.

The court also held that the state commission could exercise concurrent

jurisdiction with the SEC to regulate the securities of a holding company subsidiary if it were a gas company engaged in the intrastate business of retail sales. Id. at 62.

Great Lakes is supportive of APSC jurisdiction over AP&L's execution of the Grand Gulf financing agreements. AP&L is registered to do business in Arkansas; its retail operations are regulated by the APSC; it makes retail sales directly to customers in Arkansas; and its generating facilities are regulated by the APSC. Moreover, AP&L's operations are not solely interstate in nature. Under the principles set forth in Great Lakes, a state commission could exercise concurrent jurisdiction with the SEC over the security transactions of a utility such as AP&L.

As seen in the Statement of the Case, AP&L explicitly pledged its credit to help finance the Project. Its credit was used as collateral and security for the debt of MSE to its creditors. All such evidences of indebtedness -- the Availability Agreement, its Amendments and Assignments -- were submitted to and approved by the SEC. They were never submitted to the APSC for concurrent approval. Without such approval, they are void as a matter of law.

The opinion below rejected APSC jurisdiction and thus conflicts with the clear purpose of the Holding Company Act, justifying the grant of certiorari herein sought.

II. The Decision Below Misconstrues The Federal Power Act and its Relation To The Public Utility Holding Company Act.

In its decision, the court below suggests that the Federal Power Act denies the APSC any authority to regulate the agreements in question. This conclusion apparently results from the court's reliance on the District Court's erroneous finding that the APSC sought to regulate "agreements for the purchase of wholesale power in interstate commerce." Although the Court of Appeals ruled on other grounds, there exists sufficient conflict on this point to justify a discussion of the Federal Power Act.

The Federal Power Act, 16 U.S.C. § 824(b), establishes the jurisdiction of the FERC to regulate the transmission

of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. The Commission's jurisdiction extends to the setting of rates and charges for the transmission and sale of such electric energy. Id., § 824d.

The Act grants the FERC authority over the issuance of utility securities, but not those involving "a public utility organized and operating in a state under the laws of which its security issues are regulated by a state commission." Id., § 824c(f). Furthermore, when a conflict of jurisdiction exists between the FERC and the SEC as to the approval of utility securities, the former agency will relinquish jurisdiction to the latter. Id., § 825q.

MSE and the system companies did not go to the FERC for approval of the financing agreements. They were never submitted to the FERC for approval of any kind. Nonetheless, MSE and AP&L insist that the agreements are subject to exclusive FERC jurisdiction. If this were true, then SEC regulation of them would be rendered meaningless, and they would go unregulated as securities and financing transactions.

There is no conflict of jurisdiction between the FERC and the SEC on these matters, nor between the FERC and the APSC, should the latter regulate AP&L's indebtedness for the Project. Such regulation by the APSC will have no effect on FERC setting of the Project's wholesale power rate. This point has been unequivocally conceded by MSE's

key witness in written testimony before the APSC in its show-cause docket: "First of all, any action taken by this Commission in this proceeding will not affect the decision by the FERC, or the Courts, with respect to the allocation of Grand Gulf power." (R. 140).

The obligations incurred by the system companies were to retire the debt of MSE to the bankers and bondholders even if the plant never operated, with payments to begin on specified dates. Additionally, the system companies incurred liability if the creditors demanded payment in full following an Event of Default. All such obligations could be activated independently of any obligations incurred by the system companies pursuant to a wholesale power rate.

For the foregoing reasons, any decisions concerning FERC preemption over wholesale power rates are not relevant to this case. E.g., City of Colton, California v. Southern California Edison Company, 376 U.S. 205, 84 S.Ct. 644 (1964); Southwestern Bell Telephone Co. v. Arkansas Public Service Commission, 738 F.2d 901 (8th Cir. 1984); and State of Minnesota, et al. v. FERC, 734 F.2d 1286 (8th Cir. 1984).

Moreover, this Court has recognized that the Federal Power Act expressly allows a state to regulate the security transactions of utilities subject to state regulation. Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61, 73 (1942).

Additionally, the Supreme Courts of Wyoming and Washington have upheld state

authority to regulate agreements that pledge the credit of jurisdictional utilities to pay the financing costs of power plants, even when such agreements contain language as to the purchase of power from the plant. Pacific Power and Light Co., et al. v. Public Service Commission of Wyoming, et al., 677 P. 2d 799 (Wyo. 1984), and Chemical Bank v. Washington Public Power Supply System, 666 P. 2d 329 (Wash. 1983).

Any cases decided pursuant to the Natural Gas Act (NGA), 16 U.S.C. § 717 et seq., and the Federal Communications Act (FCA), 47 U.S.C. § 151 et seq., are not depositive of the issues herein. This conclusion is sound even though this Court has held that decisions applying the NGA can be used to define the jurisdictional scope of the Federal

Power Act. City of Colton, supra. Key differences exist between the NGA and FCA on the one hand and the FPA on the other, relevant to federal jurisdiction over utility securities.

The FPA does not grant to the FERC authority to issue certificates of convenience and necessity for new electric generating facilities. Rather, such authority has remained with state utility commissions. Pacific Gas and Electric Co. v. Energy Resources Comm., 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983). The Act expressly precludes the FERC from exercising jurisdiction over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b). Additionally, while the Act grants the FERC authority over the issuance of utility securities, it exempts securities

regulated by a state commission. Id., § 824c(f).

In contrast, the NGA grants sole authority to the FERC to issue certificates of convenience and necessity for facilities engaged in the transportation or sale of natural gas. 15 U.S.C. § 717f(c). Likewise, the FCA grants authority to the Federal Communications Commission to issue such certificates for the facilities of telephone companies. 47 U.S.C. § 214.

FERC jurisdiction to regulate the securities of natural gas companies emanates from the agency's authority under the NGA to issue certificates of convenience and necessity. Natural Gas Pipeline Company of America, et al. v. Illinois Commerce Commission, 33 Ill.2d 214, 210 N.E.2d 490, 492. The NGA,

unlike the FPA, does not exempt from FERC regulation securities regulated by a state. Thus, the court in Natural Gas Pipeline held that state regulation of the securities in question "would create the 'prospect of interference with the federal regulatory power' over plans for financing the construction or extension of facilities subject to jurisdiction of the Federal Power Commission." Id. at 494.

It should be emphasized here that the FERC, pursuant to the FPA, has not and cannot regulate the Grand Gulf Project as to a certificate of convenience and necessity or securities for plant financing.

The decision in Natural Gas Pipeline has no application to the instant case. State jurisdiction there

was struck down owing to a conflict with jurisdiction exercised by the FERC. APSC regulation of the Grand Gulf financing agreements cannot conflict with FERC jurisdiction. For similar reasons, other decisions are not on point with the instant case: E.g. Western Union v. Michigan Public Service Commission, 338 N.W.2d 731 (Mich. App. 1983); Panhandle Eastern Pipeline Company v. Public Utilities Commission of Ohio, 383 N.E.2d 1163 (Ohio 1978); and State ex rel. Utilities Commission v. Southern Bell Telephone Company, 217 S.E.2d 543 (N.C. 1975). In each case, state regulation of securities would have conflicted with their regulation by federal agencies.[3]

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[3]In the two telephone company cases, federal jurisdiction was exercised by the SEC, but not pursuant to the Public Utility Holding Company Act. Rather, the SEC regulated pursuant to the Securities Act of 1933, 15 U.S.C.

The conflicts raised by the courts below on this issue of FERC preemption provide additional justification to grant the certiorari sought herein.

III. The Decision Below Conflicts With Supreme Court Cases Interpreting The Commerce Clause.

The issue presented to the court below involved whether the Federal Power Act preempted APSC review of AP&L's indebtedness, as found by the District Court, or whether the APSC and the SEC share concurrent jurisdiction thereof. Instead of resolving this question, the Court of Appeals applied a Commerce Clause analysis under U.S. Const., Art. I, § 8, cl. 3. That analysis must fail for at least three reasons: it is

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§§ 77a et seq. This fact also serves to distinguish these decisions from the instant case.

inappropriate to apply owing to an explicit recognition by Congress of the right of states to legislate in this area; it is premised on erroneous and unfounded assertions as to APSC intent; and the effect on interstate commerce of possible APSC action would be incidental at worst.

First, the SEC has specifically recognized APSC jurisdiction over AP&L's financial commitments to the Grand Gulf project. Middle South Utilities, Inc., SEC Holding Company Act Release No. 23495 (November 23, 1984). In that decision, the SEC approved the issuance of MSE bonds and said that it

> does not resolve disputed issues of state law and the order in this case does not prejudice the Arkansas Commission, which may assert jurisdiction under whatever procedures the state law permits.

See Note 5, Opinion of Court of Appeals, Appendix herein. In a similar proceeding, Middle South Utilities, Inc., SEC Holding Company Act Release No. 23579, Memorandum Opinion (January 23, 1985), the SEC stated:

> Our approval of the availability agreement ... did not mean that state law was preempted. Section 21 declares that nothing in the [Holding Company] Act shall affect the jurisdiction of any other commission ... so long as such jurisdiction is not in conflict with the Act.... The authorization of the availability agreement in 1974 and the amendments in 1981 determined only that Federal requirements under the Act have been met.

Id. at 7-8. The SEC opinion made it clear that APSC exercise of jurisdiction should come in state proceedings, rather than before the SEC. Id.

Additionally, the utility whose securities were regulated by the state

in Michigan Power Company, supra, was engaged solely in the sale of wholesale power. Nonetheless, the court held: "...Congress, which has legislative authority over interstate commerce, has explicitly recognized and affirmed state jurisdiction in legislating in the area." 275 N.W.2d 450, 456. To illustrate federal recognition of a state role, the court cited the same provisions of the Holding Company Act relied on by the petitioner in this case.

It is undisputed, even by the court below, that the Federal Power Act and the Holding Company Act specifically address the right of states to regulate the securities of electric utilities operating within their borders. But the court below, by drawing on several cases

not on point with this one, labored to hold that the statutes "do not preclude us from finding a violation of the commerce clause here." Throughout its discussion of this issue, the court searched in vain for any statements in the Holding Company Act that "insulate the APSC's actions from examination under the commerce clause." Several statements in the Act, however, lead to that very conclusion.

In Sections 79a(b) and (c) of the Act, Congress set forth a strong policy statement declaring that an evil to be eliminated is the issuance of securities "...without the approval or consent of the states having jurisdiction over subsidiary public-utility companies...." Id., § 79a(b)(1). That statement went on to declare that the evils to be eli-

minated are "connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce." Id., § 79a(c), emphasis supplied.

To assist the states in regulating utility securities, Congress empowered the SEC to approve them but only when state laws also were complied with. Id., § 79g(g). Moreover, in Section 79ù, Congress specifically reserved jurisdiction to the states, "insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder." The court below did not suggest that APSC jurisdiction over the agreements in question would conflict with the Act or SEC action. Failing such conflict, a

reasonable statutory interpretation would hold that a state may regulate in this area, as does the SEC, despite any impact on interstate commerce.

Second, in seeking to find a discriminatory purpose by the APSC in its show-cause docket, the court below erroneously concluded that "the APSC is trying to secure for Arkansas the zero allocation" of Grand Gulf disallowed by the FERC. "Arkansas...seeks to close its borders to high-cost electricity," the court continued, and this creates "a preference for citizens in the regulatory jurisdiction gained at the expense of out-of-state customers." Such assertions are not supported by the record in this case: to regulate utility securities and indebtedness is not to regulate wholesale power allocations and

transmission. The contracts listed in the show-cause order do not control the allocation or transmission of Grand Gulf electricity. Additionally, APSC regulation of them would not operate at the expense of out-of-state citizens. For these reasons, the lower court's reliance on such decisions as New England Power Company v. New Hamphsire, 455 U.S. 331 (1982), is unsound and will result in a far broader application of the Commerce Clause than intended by this Court.

Third, any APSC action taken through its show-cause docket would have only an incidental effect on interstate commerce. The regulation of utilities is one of the most important functions of the police power of the states. Ark. Electric Cooperative Corp. v. Ark. Pub.

Serv. Comm., 461 U.S. 375 (1983). A state has a very substantial interest in the issuance of securities under its laws by a company organized and operating within that state. Indiana Michigan Power Co. v. State of Michigan, 275 N.W.2d 400 (1979). Arkansas thus has a legitimate local interest in protecting the financial integrity of utilities within its borders and the public interest of its citizens who deserve proper state oversight of a utility's indebtedness. Even the Eighth Circuit Court has recognized the states' interests in regulation of local public utilities. South Dakota Public Utilities v. F.E.R.C., 690 F.2d 674 (8th Cir. 1982).

Unless the burden imposed on interstate commerce is excessive rela-

tive to local benefits, evenhanded state regulation of a legitimate local public interest is upheld if its effect on interstate commerce is incidental. Pike v. Bruce Church, 397 U.S. 137 (1970). As for the burden, MSE presented evidence at trial that financial markets and investors in MSU stock were subjected to uncertainty and unrest by the show-cause docket. Such incidental effects are not the type of discrimination forbidden by the Commerce Clause. Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985). Arkansas' interest in regulating the securities of a utility within its borders outweighs any incidental impact on creditors in other states. Such interest can be reasonably compared to the one upheld in Ark. Electric Cooperative Corp., supra.

The lower court's decision clearly conflicts with this court's application of Commerce Clause principles, offering another justification to grant the writ sought herein.

IV. The Interference By The Courts Below In State Proceedings Conflicts With Decisions Of This Court

Both the district court and court of appeals should have abstained from interfering with the APSC show-cause proceeding under doctrines established by this court in Younger v. Harris, 401 U.S. 37 (1971), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). This justifies the grant of certiorari requested herein.

V. The Subject Matter Jurisdiction Exercised By The Courts Below Conflicts With The Well-Pleaded Complaint Doctrine Of This Court

MSE's assertion of federal preemption, the central issue raised in its complaint to the district court below, actually constituted a defense to the allegations raised in the APSC show-cause order, and thus conflicts with 28 U.S.C. § 1331(a) and § 1337, as interpreted by this court in Public Service Comm. v. Wycoff Co., 344 U.S. 237 (1952) and Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). This provides further justification to grant the certiorari sought by the petitioner.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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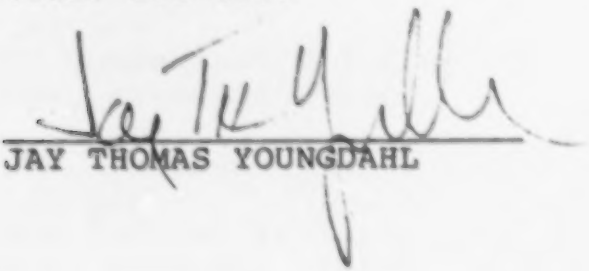

JAY THOMAS YOUNGDAHL

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit, with Appendix, by regular mail, postage pre-paid, on this 21st day of November, 1985 to the following:

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85-895 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

RATEPAYERS FIGHT BACK

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.
ARKANSAS POWER & LIGHT CO.
ARKANSAS PUBLIC SERVICE COMMISSION
ATTORNEY GENERAL OF ARKANSAS

RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-2409
No. 84-2410
No. 84-2480

Middle South Energy, Inc., and
Arkansas Power and Light
Company,

Appellees,

v.

Arkansas Public Service
Commission; Robert E. Johnston,
Commissioner; Patricia S. Qualls,
Commissioner; and James W. Daniel,
Commissioner; Attorney General of
Arkansas; and Ratepayers Fight Back,

Appellants.

Appeal from the United States
District Court for the
Eastern District of Arkansas

Submitted: April 8, 1985

Filed: August 23, 1985

Before ROSS and JOHN R. GIBSON, Circuit Judges, and MEREDITH,* Senior District Judge.

JOHN R. GIBSON, Circuit Judge.

*The HONORABLE JAMES H. MEREDITH, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

The issues before us involve a judgment of the district court[1] enjoining the Arkansas Public Service Commission from continuing proceedings to determine whether it should declare void ab initio certain contracts entered into by Arkansas Power and Light Company with respect to the purchase of power from, or payment for construction of, a nuclear power plant located in

[1]The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

Mississippi. The Arkansas Public Service Commission, the Attorney General of Arkansas, and a consumer group called Ratepayers Fight Back argue that the district court erred in finding that the Federal Energy Regulatory Commission has exclusive jurisdiction over the contracts that were the subject of the APSC's proceedings. They further argue that the district court lacked subject matter jurisdiction, that the litigation was not ripe, and that the court abused its discretion by failing to abstain pending the outcome of the state agency proceedings and by granting overbroad relief. We have carefully considered these arguments, and because we believe that the actions threatened by the APSC would burden interstate commerce, we affirm the judgment of the district

court.

The Arkansas Power and Light Company, together with the Louisiana Power and Light Company, the Mississippi Power and Light Company, and New Orleans Public Service, Inc., are wholly-owned operating subsidiaries of Middle South Utilities, Inc. The operating companies provide electric service to wholesale and retail consumers in Arkansas, Louisiana, Mississippi, and Missouri, with an aggregate consumer population of approximately five million people. Planning and operation of the electric generation and transmission facilities needed to meet the demands of the MSU system are performed according to systems agreements. "Transmission and generation functions are so coordinated and integrated as to permit an instan-

taneous transfer of electrical power to any part of Middle South's transmission network." Arkansas Power & Light Co. v. Federal Power Commission, 368 F.2d 376, 378 (8th Cir. 1966). Because the need was seen in the early 1970's to develop additional power generating facilities, Middle South Energy, Inc., also a wholly-owned MSU subsidiary, was created in 1974 to finance, construct, and operate a two-unit nuclear generating plant to be located in Port Gibson, Mississippi and known as the Grand Gulf Nuclear Electric Station.[2] The creation of MSE was necessary because none of the four operating subsidiaries had sufficient resources to finance and construct the nuclear generating plant.

This case involves contracts

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[2]Grand Gulf Unit No. 1 was scheduled to commence commercial operation on July 1, 1985, while the construction of Grand Gulf Unit No. 2

entered into with respect to the financing and construction of the plant, as well as agreements made concerning the sale of the power to be generated. MSE has financed the three billion dollar cost of the first unit by selling common stock to MSU,[3] borrowing from commercial banks, and issuing first

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has been suspended.

[3]MSU is registered under and subject to Securities and Exchange Commission authority by the Public Utility Holding Company Act of 1935. 15 U.S.C. §§ 79 to 79z-6 (1982). These stock sales received SEC approval. Middle South Utilities, SEC Public Utility Holding Co. Act Rel. No. 23,579 (Jan. 23, 1985). In opposing approval of the most recent stock sale, APSC urged that the SEC withhold authorization until AP&L could show compliance with Arkansas law. The SEC rejected this argument, but assured the APSC that the federal securities authorization did not "supersede requirements of state laws as they may eventually be established in respect to AP&L's commitments in the financing of the Grand Gulf project." Id. at 7.

mortgage[4] and pollution control bonds.[5]

In 1974, through a document called the Availability Agreement, MSE obtained from each of the MSU operating companies their commitment to purchase power from the Grand Gulf project. The operating companies agreed to pay MSE, beginning on specific dates, amounts needed for MSE to meet its operating expenses, whether or not the two units of the project were then operating. Payments would be credited to the cost of their future power purchases from MSE. The Availability Agreement has been essen-

---

[4]This transaction was approved by the SEC. Middle South Energy, SEC Public Utility Holding Co. Act Rel. No. 23,526 (Dec. 12, 1984).

[5]This transaction was approved by the SEC. Middle South Energy, SEC Public Utility Holding Co. Act Rel. No. 23,495 (Nov. Energy, SEC Public Utility Holding Co. Act Rel. No. 23,495 (Nov. 23, 1984). APSC urged the SEC to withhold approval on the ground that AP&L had not complied with state law. The SEC declined, but noted that the SEC

tial to the financing of the project.[6] Pursuant to a series of ten agreements entered into between 1977 and 1984, MSE has assigned its rights under the Availability Agreement to secure indebtedness in excess of $2.5 billion.[7]

The Availability Agreement initially provided that the share of Grand Gulf power taken by the operating com-

---

"does not resolve disputed issues of state law and the order in this case does not prejudice the Arkansas Commission, which may assert its jurisdiction under whatever procedures the state laws permit." Id. at 2 (footnote omitted).

[6]The financing aspects of the original Availability Agreement were approved by the SEC. Middle South Utilities, SEC Public Utility Holding Co. Act Rel. No. 18,437 (June 4, 1974). APSC did not intervene in this proceeding. Its attacks on the agreement in collateral proceedings before the SEC have been rejected. See supra notes 3 & 5.

[7]A number of agreements were executed in which the operating companies agreed that in case of default by MSE they would make payments due under the Availability Agreement directly to

panies would vary relative to their respective needs. In June 1981, the Availability Agreement was amended[8] to fix the allocations of power in these percentages:[9] AP&L - 17.1%; LP&L - 26.9%; MP&L - 31.3%; NOPSI - 24.7%.

On July 28, 1981, MSE and the operating companies entered into a Reallocation Agreement, under which the operating companies agreed to purchase power in the following percentages:

---

the banks. In return, the lenders agreed that, should some regulatory agency prohibit the operating companies from making payments under the Availability Agreement, the lenders would make unsecured advances to MSE equal to the amounts it would have received under the Availability Agreement.

[8]The amendment was approved by the SEC. Middle South Energy, Public Utilities Holding Co. Act Rel. No. 22,098 (June 22, 1981).

[9]South Mississippi Electric Power Association, which is not a subsidiary of MSU, owns 10% of the Grand Gulf project. The allocation figures pertain to the 90% share owned by MSE.

AP&L - 0%; LP&L - 38.57%; MP&L - 31.63%; NOPSI - 29.80%.[10] In June 1982, MSE and the operating companies entered into an agreement, the Unit Power Sales Agreement, which required each operating company to purchase the shares of power specified in the Reallocation Agreement. AP&L signed the UPSA but, in accordance with the terms of the Reallocation Agreement, did not agree to purchase any power from the project. The UPSA was filed with the Federal Energy Regulatory Commission for approval as a wholesale power sales agreement.

In February 1984, a FERC administrative law judge rejected the allocation in the UPSA and obligated the operating companies to purchase power from Unit No. 1 as follows: AP&L - 36%;

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[10]This agreement was approved by the SEC. Middle South Energy, Public Utility Holding Co. Act Rel. No. 22,280 (Nov. 18, 1981).

LP&L - 14%; MP&L - 33%; NOPSI - 17%.

The ALJ reasoned that:

> /T/he evidence of Middle South's witnesses is overwhelming that the Middle South system is a single integrated and coordinated electric system operating in Louisiana, Mississippi, Arkansas and Missouri. Planning, construction, and operations are conducted for the system as a whole. Loads on the system are met by centrally dispatching the most economical mix of generators wherever located in the system. Middle South Utilities, Inc. owns the stock of the operating utilities as well as the stock of MSS and MSE. When difficult system decisions have to be made, such as deciding the allocation of Grand Gulf, it is the Board of Directors of Middle South utilities, Inc., that ultimately makes the decision, not an individual subsidiary company or a group of subsidiaries.
>
> The Grand Gulf project was initiated in the 1970's to meet the then projected demand on the Middle South system by

> the end of that decade and not just the load of any Middle South operating company or companies. Constructing generation to meet system load was true of every unit constructed on the Middle South system.
>
> Under these circumstances the costs of Grand Gulf capacity and energy should be shared equitably by MSU's operating companies and their customers.

Middle South Energy, 26 F.E.R.C. ¶ 63,044, at 65,106 (1984), aff'd., 31 F.E.R.C. ¶ 61,305 (1985). The APSC had actively intervened in the proceedings before FERC. It had contended that FERC had no jurisdiction to obligate AP&L to take a share of Grand Gulf and that Arkansas neither wanted or needed the relatively high-cost power from the project. These arguments were rejected.

Approximately one month later, the APSC issued two orders instituting for-

mal inquiries into AP&L's role in the Grand Gulf project. Predicting that Grand Gulf would result in "dramatic [rate] increases" which would place an "intolerable burden" on AP&L's customers and have a "crippling effect" on the Arkansas economy, Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-041-OII, at 1 (Mar. 12, 1984), the APSC ultimately sought to "protect the interests of the residential, business, and industrial customers of AP&L and preserve the viability of the economy of the State of Arkansas." Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-040-OII, at 2 (Mar. 12, 1984).

On August 1, 1984, the APSC ordered AP&L to appear and "show cause why all contracts and agreements made by it with

respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf project should not be held to be void ab initio as a matter of law." Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-190-U, at 6 (Aug. 1, 1984). The APSC had already concluded that thirty-six such agreements constituted prima facie violations of Arkansas law requiring APSC approval of certain transactions by public utilities. Id.; see Ark. Stat. Ann. § 73-253(a)(3) (1979 Repl.) (utility must have APSC approval to "sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system"); id. § 73-255 (Supp. 1983) (utility must have APSC approval to "issue stocks, bonds,

notes or other evidence of indebtedness payable at periods of more than thirty-six (36) months"). After AP&L's motion to dismiss the show cause order for lack of jurisdiction was denied, MSE filed suit in the district court to temporarily and permanently enjoin the proceedings before the APSC. AP&L intervened as a plaintiff, while the Arkansas Attorney General and Ratepayers Fight Back intervened as defendants. A hearing was held on the consolidated issues of preliminary and permanent relief. The district court found that the APSC's actions were preempted by the Federal Power Act, 16 U.S.C. §§ 824-824k (1982), and permanently enjoined APSC from conducting further proceedings on the show cause order. Regarding the need for equitable relief, the court found:

> MSE must raise an additional several billion dollars in the next few years to pay constrution and financing costs. The ability to raise these funds is dependent on the enforceability of the threatened agreements. If the actions of the APSC are not enjoined, the cost of capital to MSE will be raised to the point that the Project is jeopardized, and the ability of MSE to provide its multistate wholesale customers with power will be irreparably impaired.

Middle South Energy, Inc. v. Arkansas Public Service Commission, No. LR-C-84-778, slip op. at 5 (E.D. Ark. Sept. 14, 1984).[11]

The APSC, the Arkansas Attorney General, and Ratepayers filed an appeal with this court.[12] After the case was

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[11]The SEC noted recently that delaying commercial operation of the reactor would increase costs by about $28 million per month, primarily in finance charges. Middle South Utilities, Public Utility Holding Co. Act Rel. No. 23,579 at 9 (Jan. 23, 1985).

[12]Arkansas Electric Energy

argued, FERC affirmed the order of the ALJ allocating AP&L 36% of the Grand Gulf capacity. Middle South Energy, 31 F.E.R.C. ¶ 61,305 (1985).

I.

As an initial matter, amicus curiae on behalf of the APSC[13] asserts that MSE's suit does not "aris[e] under the Constitution [or] laws *** of the United States" as required to invoke federal question jurisdiction under 28 U.S.C. § 1331 (1982) because, pursuant to the "well-pleaded complaint" rule, the federal question must be raised necessarily as an element of the plain-

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Consumers and Reynolds Metals Company filed an amicus curiae brief, as did the Metropolitan Life Insurance Company and other holders of MSE's first mortgage bonds.

[13]We consider this issue, though not raised by a party, since subject matter jurisdiction cannot be waived or conferred by consent. Insurance Corp.

tiff's entitlement to relief and cannot merely be a response to an anticipated defense. See generally Francise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 7-12 (1983) (citing older cases). Specifically, amicus curiae argues that jurisdiction is lacking because MSE's preemption claim is merely a defense to the state administrative action. See id. at 15-16 (discussing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)). This argument ignores the recognition by the Supreme Court that "a claim of federal preemption does not always arise as a defense to a coercive action." Franchise Tax, 463 U.S. at 12 n.12; see

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of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702 (1982); United States ex rel. Burnette v. Driving Hawk, 587 F.2d 23, 24 (8th Cir. 1978).

Aluminum Co. of America v. Utilities Commission, 713 F.2d 1024, 1028 (4th Cir. 1983), cert. denied, 104 S. Ct. 1326 (1984). The "not a defense to a state action" rule is premised on the determination that the declaratory judgment act, 28 U.S.C. § 2201 (1982), is merely procedural and that Congress thereby did not enlarge the subject matter jurisdiction of federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950). This concern is not implicated when the declaratory plaintiff has independent grounds for federal relief such as an injunction. Note, Federal Jurisdiction over Declaratory Suits Challenging State Action, 79 Colum. L. Rev. 983, 1001 (1979).[14] Thus, the district court

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[14]To deny access to federal court when, regardless of the existence of procedures for declaratory relief, an injunction would otherwise have been

available would contract the jurisdiction of the federal courts. Note, supra, at 1001. Cases that appear to have taken this route have generally relied on the Supreme Court decision of Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952), which actually turned on the failure of the plaintiff to establish a ripe controversy or to identify what right it was asking the court to declare. Id. at 244-46; see Franchise Tax, 463 U.S. at 16 n. 14. Furthermore, the widely quoted Wycoff dictum suggesting that even if the controversy had been ripe, federal subject matter jurisdiction would have been lacking, is again couched solely in terms of declaratory relief, the Court having determined that the plaintiff had abandoned its request for an injunction because of the absence of proof of the threatened injury necessary to support that form of relief. 344 U.S. at 241. The Supreme Court itself has never interpreted Wycoff, as some courts of appeals have, to hold that subject matter jurisdiction does not exist any time a federal claim can be litigated as a state defense. Illinois v. General Elec. Co., 683 F.2d 206, 211 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983); Braniff Int'l v. Florida Pub. Serv. Comm'n, 576 F.2d 1100, 1104 (5th Cir. 1978). Concerns with the timing of adjudication need not distort analysis of subject matter jurisdiction but instead can be--and more appropriately are--handled through the discretion of courts in matters involving equitable relief and through doctrines such as exhaustion of administrative remedies and abstention. Note, supra, at 1001.

had subject matter jurisdiction pursuant to MSE's complaint, which on its face properly raises the federal question of whether the state proceeding should be enjoined on preemption[15] grounds.[16] Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983).

Appellants nevertheless argue that jurisdiction is lacking because there will be no "ripe" case or controversy until the APSC reaches some determination as to the validity of the contracts and the effects of that deter-

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[15]It makes no difference to subject matter jurisdiction that we ultimately choose not to decide this case on preemption grounds. Furthermore, the operation of the commerce clause in limiting state authority is sufficiently similar to preemption that we believe the same jurisdiction analysis applies.

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[16]There are no Eighth Circuit decisions to the contrary. Despite the representations of amicus curiae, three of the cases it cites stand only for the proposition that a preemption claim does

mination are felt by MSE. See Abbott

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not raise a federal question under section 1331 when, absent the availability of the declaratory judgment procedure, it would have arisen only as a defense to a state action. Neither the language nor context of these cases extends this interpretation of the well-pleaded complaint rule to foreclose injunctions sought on preemption grounds. E.g., First Fed. Sav. & Loan Ass'n v. Anderson, 681 F.2d 528 (8th Cir. 1982) (declaratory judgment only sought; no pending state proceeding to enjoin); Lawrence County v. South Dakota, 668 F.2d 27 (8th Cir. 1982) (same); First Nat'l Bank v. Aberdeen Nat'l Bank, 627 F.2d 843 (8th Cir. 1980) (en banc) (removal to federal court improper when based on ground that preemption would be raised as a defense to state tort action). The one case cited by amicus curiae in which we did find subject matter jurisdiction lacking despite a request for an injunction is distinguishable in that the panel expressly found the preemption claim there to be only in the nature of a defense to the state administrative proceeding. Home Fed. Sav. & Loan Ass'n v. Insurance Dep't, 571 F.2d 423, 427 (8th Cir. 1978). Since MSE is seeking affirmative relief from the APSC's attempts to even inquire into certain affairs relating to its business, we need not decide if the characterization of the preemption claim in Home Federal remains viable in light of Shaw.

Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). This argument again ignores the true nature of the relief sought. MSE challenges not the state's ultimate substantive decision but its authority to even conduct the contemplated proceeding. It can hardly be doubted that a controversy sufficiently concrete for judicial review exists when the proceeding sought to be enjoined is already in progress.

II.

The district court's decision on preemption grounds was based on the Federal Power Act. Congress's purpose in enacting the Act was to regulate "the transmission of electric energy in interstate commerce and *** the sale of electric energy at wholesale in

interstate commerce." 16 U.S.C. § 824(b) (1982). To accomplish this goal, Congress gave FERC the power to make "just and reasonable" any public utility "rule, regulation, practice or contract affecting [a] rate, charge, or classification [that] is unjust, unreasonable, unduly discriminatory or preferential." Id. § 824e(a) (emphasis added).

The district court held that the Availability Agreement and its amendments were "agreements for the purchase of wholesale power in interstate commerce or are so integrally related to such purchases that they are subject to the exclusive jurisdiction of the FERC." Slip op. at 7. The other agreements subject to the APSC order were found to be "essential to the interstate whole-

sale sale of power and therefore *** not subject to state jurisdiction." Id. We read the district court's order as finding preemption on the ground that the threatened actions of the APSC would block the accomplishment of the purpose behind the Federal Power Act. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Essentially, the APSC is trying to secure for Arkansas the zero allocation embodied in the UPSA. Such a result would be contrary to the 36% allocation recently approved by FERC in regulating the wholesale aspects of the Grand Gulf project. Thus, a strong argument can be made that the APSC's powers have been preempted by the Federal Power Act. The appellants, on the other hand, urge that we examine the APSC's powers in light of other federal legislation, the Public

Utility Holding Company Act of 1935. This law, they argue, expressly reserves to the states some jurisdiction to regulate the securities dealings of utility holding companies and their subsidiaries. See 15 U.S.C. §§ 79f(b), 79g(g), 79u (1982); infra at 17-20; supra notes 3 & 5.

The district court's order did not squarely deal with the argument now made by appellants. We are not convinced that the district court improperly based its decision on preemption grounds. Nevertheless, we choose not to address the difficult question of whether the authority denied the states under the Federal Power Act may be granted to them by the Holding Company Act, because the case can be disposed of under well-settled commerce clause principles. See

New England Power Co. v. New Hampshire, 455 U.S. 331, 334 n.10 (1983) (deferring resolution of preemption issues in favor of commerce grounds).

III.

The commerce clause grants Congress the power to regulate commerce among the states. U.S. Const., art. I, § 8, cl. 3. It has long been recognized as implying limits on the powers of the states to erect barriers against interstate trade. South-Central Timber Development v. Wunnicke, 104 S. Ct. 2237, 2240 (1984); see Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 317-18 (1852). Absent conflicting federal legislation, the states may exercise police power over matters of legitimate local concern even though such regulation may affect

interstate commerce. Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Raymond Motor Transporation v. Rice, 434 U.S. 429, 440 (1978). Incidental burdens on interstate commerce may be unavoidable when a state legislates to protect its citizens. Philadelphia v. New Jersey, 437 U.S. at 623-24. Nevertheless, the safeguarding of local interests must ultimately yield to the principle that "one state in its dealings may not place itself in a position of economic isolation." Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 527 (1935).

"[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." Arkansas Electric Cooperative Corp. v. Arkansas

Public Service Commission, 461 U.S. 375, 377 (1983). "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 205 (1983); see also Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980) ("The states's concern that rates be fair and efficient represents a clear and substantial governmental interest."). At the same time, however, the "production and transmission of energy is an activity particularly likely to affect more than one state, and its effect on interstate commerce is often significant enough that

uncontrolled regulation by the States can patently interfere with broader national interests." Arkansas Electric, 461 U.S. at 377. The dispositive issue here is whether the APSC's desire to protect Arkansas' interest has resulted in an impermissible burden on interstate commerce.

IV.

The Attorney General argues that since the APSC has only issued a show cause order, and not actually voided the contracts in issue, there is no significant burden on interstate commerce. The APSC's position in the administrative proceedings surrounding Grand Gulf, however, leaves little doubt that APSC intends to substantially reduce or eliminate AP&L's participation in the pro-

ject. The threat of enforcement presented by the show cause order is sufficient to support an injunction against further proceedings.

On March 12, 1984, the APSC issued two orders instituting investigations. The first, retrospective in nature, referred to developments in FERC proceedings that "portend[ed] catastrophically enormous rates increases" for AP&L customers. Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-040-0II, at 1 (Mar. 12, 1984). The second order, prospective in nature, was to

> look forward to ascertain what the ratepayers of AP&L, AP&L itself, the Commission, the Governor, and the General Assembly may do to circumvent or deflect the economic harm that looms over the State from the imminent prospect of being mandated by a federal agency tc pay for a power generating plant that is possibly neither needed or wanted by anyone in

> Arkansas, *** and that would, if forced upon the State, potentially result in such immense amounts of excess generating capacity that it could neither be used or sold by AP&L.

Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-041-0II, at 2 (Mar. 12, 1984); see supra at 6.

Nearly five months later, APSC issued the show cause order that gave rise to this lawsuit. It listed thirty-six agreements relating to the Grand Gulf project, and stated: "The construction of the Grand Gulf Project was and is dependent on the[se] agreements." Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-190-U, at 5 (Aug. 1, 1984). The APSC stated that its approval, required by Arkansas law, had not been given the agreements and that some or all were

"prima facie violations of Arkansas law." Id. at 6. AP&L was ordered to appear and show cause "why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held void ab initio as a matter of law." Id. The APSC later denied AP&L's motion to dismiss the show cause order for lack of jurisdiction based on FERC's exclusive jurisdiction over the agreements. Arkansas Power & Light Co., Ark. Pub. Serv. Comm'n Docket No. 84-190-U (Aug. 31, 1984).

The APSC argued vigorously before both FERC and the SEC for a reduction or elimination of AP&L's role in Grand Gulf. In an SEC proceeding to authorize

the sale of common stock by MSE, the APSC asked the Commission to consider the "discontinuance or moth-balling" of the Grand Gulf project. Middle South Utilities, SEC Public Utility Holding Co. Act Rel. No. 23,579 at 9 (Jan. 23, 1985). In litigation before FERC, the APSC sought to avoid the allocation of any Grand Gulf power to Arkansas, claiming that the state does not need and cannot economically use the power. Middle South Energy, 26 F.E.R.C. ¶ 63,044 (1984), aff'd, 31 F.E.R.C. ¶ 61,305 (1985).[17]

The threat posed by the show cause order is sufficient to warrant the injunction. In Pennsylvania v. West Virginia, 262 U.S. 553 (1923), two states brought suits to enjoin West

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[17]Further, after this lawsuit was filed, the following account appeared in the press: "[A]n attorney representing the Arkansas utility com-

Virginia from enforcing legislation that would have reduced out-of-state delivery of West Virginia natural gas. The Court rejected the argument that the suits were premature, finding that the gas curtailment was "presently threatened and likely to be productive of great injury." Id. at 591. In proceeding to consider the merits of the commerce clause issue, the Court observed: "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." Id. at 593; see also Pacific Gas & Electric Co. v.

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mission said the commission staff is confident it can defend its order against the Middle South suit. He added that "if the APSC voids AP&L's part (of Grand Gulf), the whole thing goes down the toliet." Wall St. J., Sept. 6, 1984, at 7, col. 4-5 (Plaintiff's Ex. 10).

State Energy Resources Conservation & Development Commission, 461 U.S. 190, 201 (1983) (decision on preemption of state nuclear-waste disposal law should not be delayed because postponement "would likely work substantial hardship on the utilities").

The mere possibility that a state's interpretation of its law may avoid the necessity for an injunction does not preclude federal review. In City of Chicago v. Atchison, Topeka & Santa Fe Railway, 357 U.S. 77 (1958), the Court rejected an argument in a commerce clause case that a declaratory judgment should not issue because the state courts had not been given a chance to act. Among other things, the Court reasoned that: "Remission to [state court] would involve substantial delay

and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight." Id. at 84.

In this case, as in the West Virginia and Pacific Gas cases, the threatened action is likely to cause great injury, in the form of higher financing costs for MSE. Also, as in City of Chicago, the chance of a state adjudication obviating the commerce clause issue is remote. Thus, we conclude that a commerce clause violation can be found notwithstanding that the APSC has not actually voided the agreements. Cf. Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84, 92 (1963) ("[A]lthough collision between the state and federal regulation may not be an inevitable

consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity."); Public Service Commission v. Wycoff Co., 344 U.S. 237, 245 (1952) (Court refused to allow suit for declaratory relief against state commission where no "risk of suffering penalty, liability or prosecution was shown"); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 308-09 (1937) (declining to find a commerce clause violation in utilities commission merely seeking records, the Court noted that no action based on discovered information was alleged and that it "will be time enough to challenge such action of the commission when it is taken or at least threatened") (emphasis added) (citations omitted).

V.

We next consider appellants' argument that Congress has authorized any unconstitutional effect that the APSC's actions may have on interstate commerce. Congress may confer upon the states the ability that they would otherwise not enjoy to restrict the flow of interstate commerce. Lewis v. BT Investment Managers, 447 U.S. 27, 44 (1980); Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). "But when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" New England Power Co. v. New Hampshire, 455 U.S. 331, 343

(1982) (quoting Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 427 (1946); United States v. Public Utilities Commission, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)). Rather, "for a state regulation to be removed from the reach of the dormant commerce clause, congressional intent must be unmistakably clear." South-Central Timber Development v. Wunnicke, 104 S. Ct. 2237, 2242 (1984).

Ratepayers urge that there has been an "explicit recognition by Congress of the authority of a state to regulate the securities of an electric utility operating within its borders." It is true that the Public Utility Holding Company Act of 1935 (HCA), 15 U.S.C. §§ 79 to 79z-6 (1982), expressly reserves some regulatory powers to the sta-

tes. Nevertheless, the provisions that Ratepayers rely upon show no congressional purpose to insulate the APSC's activity from commerce clause scrutiny.

The HCA generally requires registered companies and their subsidiaries to file declarations with the SEC that must be approved before securities may be issued or sold. 15 U.S.C. §§ 79f, 79g. Section 79f(b) exempts from the declaration requirement securities of a subsidiary company of a registered holding company, "if the issue and sale * * * are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State Commission of the state in which such subsidiary company is organized and

doing business." This narrow exemption obviously envisions a transaction completely different from the Grand Gulf agreements. The documents of concern to the APSC involve all the entities in the Middle South system. They implicate interstate commerce far more than the intrastate dealings between a state commission and a single subsidiary do. Thus, we find in section 79f(b) no express statement by Congress to exemp the APSC's activity from the commerce clause.

A related provision, section 79g(g), provides for state input during the SEC's consideration of proposed declarations:

> If a State commission or State securities commission having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission * * * that

> State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration * * * to become effective until and unless the Commission is satisfied that such compliance has been effected.

Like section 79f(b), this section contains no direction from Congress concerning immunity from the commerce clause.

These conclusions are supported by New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). In New England Power, the Court considered the relationship of the commerce clause to the Federal Power Act. A state utilities commission had sought to restrict the export of hydroelectric energy generated within the state. The state claimed that this action was not invalid under the commerce clause because a section in

the Federal Power Act provided that the Act "shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." Id. § 824(b). The Court interpreted this section as doing nothing more than saving from federal preemption state authority that was otherwise lawful. It concluded that section 824(b)

> is in no sense an affirmative grant of power to the states to burden interstate commerce "in a manner which would otherwise not be permissible." * * * Nothing in the legislative history or language of the statute evinces a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause," or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade. Rather, Congress' concern was simply "to define the extent of the federal legislation's pre-emptive effect on state law."

455 U.S. at 341 (citations omitted).

The provisions of the HCA discussed above are facially similar to the statute at issue in New England Power. Moreover, the Federal Power Act and the HCA have similar legislative histories. Compare New England Power, 455 U.S. at 341 ("The legislative history of the [Federal Power] Act * * * indicates that Congress intended only that its legislation 'tak[e] no authority from State commissions.'") (quoting H. R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935)), with Alabama Electric Cooperative v. Securities & Exchange Commission, 353 F.2d 905, 907 (D.C. Cir. 1965) ("The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation-- not to supplant it.").

Thus, sections 79f(b) and 79g(g) do not preclude us from finding a violation of the commerce clause here.

Ratepayers also contend that 15 U.S.C. § 79u saves any commerce clause transgression. This section provides:

> [N]or shall anything in this chapter affect the jurisdiction of any other commission, board, agency or officer of * * * any state or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

In Edger v. Mite Corp., 457 U.S. 624 (1982), the Supreme Court considered whether a state tender offer statute violated the commerce clause. The federal securities laws contained a provision nearly identical to section 79u. See 15 U.S.C. § 78bb(a) (1982). There

was no suggestion made that this savings provision could authorize state violations of the commerce clause. Rather, Justice White interpreted the statute as leaving to the courts to decide whether similar state legislation may be preempted.. 457 U.S. at 631. Although Justice White did not speak for the whole Court, Mite supports a conclusion that section 79u does not insulate the APSC's actions from examination under the commerce clause.

VI.

We must next determine the appropriate level of scrutiny under the commerce clause. The Supreme Court has recently applied two tests to state restrictions on the flow of interstate power. In New England Power Co. v. New

Hampshire, 455 U.S. 331 (1982), the New Hampshire Public Utilities Commission sought to restrict the export of hydroelectric energy produced within the state. The Commission's purpose was to contain the cost savings associated with this cheaper form of electrical generation to the citizens of New Hampshire. This savings was to be obtained at the expense of customers in neighboring states that had been sharing the power produced in New Hampshire. Id. at 335-36, 339. The Supreme Court had no trouble concluding that this sort of "protectionist regulation" was forbidden by the commerce clause. Id. at 339. Two reasons were cited for reaching this result. First, the utilities commission had made clear that its order was "designed to gain an economic advantage

for New Hampshire citizens at the expense of * * * customers in neighboring states." Id. Second, the Court found indisputable that the "'exportation ban' place[d] direct and substantial burdens on transactions in interstate commerce." Id. (citing Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927)). There was no discussion of balancing the state's interest against the detriment to interstate commerce.

A different analysis was used the next year in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983). At issue was an order of the APSC asserting jurisdiction over the wholesale rates charged retail distributors by a rural power cooperative. The

cooperative argued that this assertion violated the commerce clause under the test articulated in Attleboro, which invalidated regulations imposing a "direct" rather than "indirect" burden on interstate commerce. 461 U.S. at 390; see Attleboro, 273 U.S. at 90. The Court, however, decided to apply "an analysis grounded more solidly" in modern commerce clause cases: "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 461 U.S. at 393-94 (quoting Pike v. Bruce Church, 397 U.S. 137, 142 (1970)). After applying this test, the Court

upheld the APSC's assertion of jurisdiction.

Thus, the Court has applied a rule of presumptive invalidity to regulations designed to further economic protectionism, and a balancing test, which if far more deferential to the states, to facially neutral regulations. See Generally Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408, 1420-22 (4th Cir. 1985) (discussing flux in commerce clause jurisprudence). New England Power and Arkansas Electric can be harmonized under the following standard: "[W]here simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected. In contrast, legislation that visits its effects equally upon interstate and local business may sur-

vive constitutional scrutiny if it is narrowly drawn." Lewis v. BT Investment Managers, 447 U.S. 27, 36 (1980). The "crucial inquiry," therefore, is whether the APSC's action "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). If a discriminatory purpose is found, there is no need to engage in the Bruce Church balancing approach. Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3055 (1984).

"A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory

effect." Id. In this case, there is ample evidence of both. The APSC seeks to cancel the Grand Gulf agreements ostensibly because they have not received the necessary state regulatory approval. Its apparent concern, which has been made abundantly plain in its orders and its arguments before the SEC and FERC, however, is the economic impact on Arkansas citizens caused by AP&L's participation in Grand Gulf. It seeks to deflect what it has estimated to be rate increases of more than $3.5 billion over the next ten years.[18] Given free rein, the APSC would shift this burden to the citizens of Mississippi and Louisiana, citizens who are powerless to directly influence Arkansas' internal affairs.

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[18] See Middle South Energy, 26 F.E.R.C. at 65,097:

Because the costs of power from Grand

In New England Power, New Hampshire sought to contain within the state the benefits of low-cost power. Arkansas, conversely, seeks to close its borders to high-cost electricity. The effect of both actions is the same: a preference for citizens in the regulating jurisdiction gained at the expense of out-of-state customers. Nor can it be doubted that the APSC's action would constitute a direct and substantial burden on interstate commerce. The integrated nature of MSU and MSE, particularly the

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Gulf are perceived to be much higher than the costs of power from other sources on the MSU system, it is not surprising that each of these parties supports an allocation of power which results in the lowest allocation to the MUS operating company or companies in which the party is interested, especially during the early years of operation of Grand Gulf when the costs of Grand Gulf are higher than in later years.

Grand Gulf project, represents commerce that is interstate in a most basic form. Thus, this case is controlled by New England Power, and the APSC must be prohibited from voiding AP&L's role in the Grand Gulf project. See also Philadelphia v. New Jersey, 437 U.S. at 624 ("The clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a state's borders.").[19]

VII.

Finally, appellants assert that the district court should have used its discretion to withhold the exercise of its powers under any of several doctrines concerned with premature federal interference with state procedings.

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[19]The APSC's reliance on Indiana & Mich. Power Co. v. Michigan, 405 Mich. 400, 275 N.W.2d 450 (1979), is

Under Burford v. Sun Oil Co., 319 U.S. 315 (1943), for example, a federal court should abstain when the action before it involves matters of state law best left to the state alone. The very premise of this doctrine, however, is lacking when, as here, federal law or Constitution makes the proceeding or regulation at issue beyond the state's authority. South Central Bell Telephone Co. v. Louisiana Public Service Commission, 744 F.2d 1107, 1123-24 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870). There is no concern with protecting a legitimate state regulatory

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misplaced, for that case did not involve state regulation with protectionist motives. See Michigan Gas Storage Co. v. Michigan Pub. Serv. Comm'n, 405 Mich. 376,275 N.W.2d 457 (1979) (companion case).

scheme, Baggett v. Department of Professional Regulation, 717 F.2d 521, 524 (11th Cir. 1983), and the question becomes one of basic federal supremacy, which does not turn on local factors or local expertise. South Central Bell, 744 F.2d at 1123.

Similarly, the rule of Younger v. Harris, 401 U.S. 37 (1971), limiting injunctions of pending state proceedings embodies the principle of our federal system that legitimate state functions be respected.[20] This "comity," however, is not strained when a federal court cuts off state proceedings that entrench upon the federal domain. Baggett, 717 F.2d at 524. The legitimate state interest contemplated by Younger, see Middlesex County Ethics Committee v.

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[20]Because of our ultimate conclusion, we may assume without deciding that the Younger doctrine, which was developed in the context of

Garden State Bar Association, 457 U.S. 423, 432 (1982), does not exist when the state action has been preempted or foreclosed by the Constitution. Champion International Corp. v. Brown, 731 F.2d 1406, 1408 (9th Cir. 1984).

Abstention under Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), focuses on whether a decision by a state court might clarify state law so as to make it unnecessary to reach a constitutional issue otherwise presented. Preemption and the commerce clause, however, are matters of federal law, and there is no interpretation of

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state criminal proceedings, applies to the show cause order and proceedings contemplated by the Arkansas Public Service Commission. See generally Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (discussing scope of Younger).

Arkansas law which could make it unnecessary for us to reach the question as to whether the Constitution forecloses even the mere issuance of the show cause order entered here by the APSC. See Hotel & Restaurant Employees Union Local 54 v. Danziger, 709 F.2d 815, 832 (3d Cir. 1983), vacated on the merits sub nom. Brown v. Hotel & Restaurant Employees Union Local 54, 104 S. Ct. 3179 (1984).

Finally, the doctrine of exhaustion of administrative remedies in the context of state agency proceedings simply addresses many of the same concerns which the various types of abstention are designed to reach. See 4 K. Davis, Administrative Law Treatise § 25:1, at 350 (1983); see also West v. Bergland, 611 F.2d 710, 715-17 (8th Cir. 1979)

(developing factors used in determining whether to require exhaustion), cert. denied, 449 U.S. 821 (1980).

To the degree that irreparable harm also must be shown, see West, 611 F.2d at 719-20, MSE alleges such injury in the form of loss through exhaustion of the very right--the right to be free of the state administrative proceeding--it seeks to protect. The Supreme Court recognized such a right on similar facts in Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456 (1943), when an interstate gas supplier sought to enjoin the enforcement against it of a state agency order requiring it to prove the reasonableness of the rates it charged a customer utility within that state. Although the agency had done nothing to that point but assert juris-

diction, id. at 465, the Court upheld the injunction on the ground that the supplier suffered injury from the enforcement of the order for proof itself and that the expense of complying with such orders was among the contingencies against which Congress sought to guard in creating exclusive federal jurisdiction. Id. at 469; see also Public Utilities Commission v. United States, 355 U.S. 534, 540 (1958) ("But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."); Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U.S. 507, 512 (1947)

(state agency order requiring interstate gas supplier to file certain tariffs, rules, and regulations was not just a threat to apply the state regulatory plan but constituted actual application of the plan in its initial stages); cf. Monahan v. Nebraska, 645 F.2d 592, 597 (8th Cir. 1981) (claim that state procedure itself conflicted with federal act could not be effectively addressed by exhausting state procedure).

Here the mere assertion of jurisdiction by the APSC had a negative impact on MSE's ability to obtain investors and complete its project, thus similarly interfering with the exclusive federal scheme for governing interstate power transmission and sales. And, as in United Fuel, we observe that MSE raised the preemption question before

the APSC in a motion to dismiss the show cause order for lack of jurisdiction and only filed this suit when such motion was denied. 317 U.S. at 470 (distinguishing Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937)). We thus conclude that neither the failure of MSE to pursue further state remedies nor the abstention doctrines of Burford, Younger, or Pullman make the district court's resolution of this case an abuse of discretion. Nor are we convinced that the district court improperly determined the need for equitable relief or the scope of the injunction.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MIDDLE SOUTH ENERGY, INC.,

Plaintiff,

and

ARKANSAS POWER & LIGHT COMPANY,

Plaintiff-Intervenor,

V. No. LR-C-84-778

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER,

Defendants,

and

ATTORNEY GENERAL OF ARKANSAS,

Defendant-Intervenor,

and

RATEPAYERS FIGHT BACK,

Defendant-Intervenor.

JUDGMENT

In accordance with the Court's Memorandum Opinion issued this date, defendant Arkansas Public Service Commission is permanently enjoined from conduction further proceedings in its docket No. 84-190-U.

This 14 day of September, 1984.

HENRY WOODS, U.S. District Judge

MEMORANDUM OPINION

The complaint was filed in the above-styled action on August 31, 1984 seeking issuance of an injunction which would prevent the Arkansas Public Service Commission from conducting further proceedings in Docket

No. 84-190-U. A hearing on requested temporary relief was heard together with a hearing on the merits (at the suggestion of the Arkansas Public Service Commission and by agreement of the parties) on September 7, 1984. Although all parties were given the opportunity to present evidence, Middle South Energy, Inc. was the only party that called a witness. Extensive briefs have been filed by all concerned, and the Court is now prepared to enter its findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Middle South System consists of a parent holding company, Middle South Utilities, Inc. ("MSU") and various subsidiary companies wholly-

owned by MSU. MSU is a holding company registered under the Public Utility Holding Company Act of 1935. MSU's subsidiaries include, among others, four operating companies, Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L"), and New Orleans Public Service, Inc. ("NOPSI") (collectively the "System Companies"), a generating company, Middle South Energy, Inc. ("MSE"), and a service company, Middle South Services, Inc. ("MSS").

2. The System Companies pool their power. Their systems are interconnected. They coordinate their plans to achieve economies of scale in the construction of units to achieve desirable levels of system reserves.

These companies buy power from each other on a more or less regular basis.

3. In early 1974, MSE was created to finance, construct and operate new base load generating projects to provide electric power and energy to the System Companies. The first such project was a nuclear-powered generating plant known as the Grand Gulf Project (the "Project"). In connection with its initial financing, MSE obtained from these companies their agreement to purchase power from the Project, provided MSE would build it and make power from the Project available to these companies.

Under this agreement (the "Availability Agreement," PX 1-A), the System Companies agreed, in consideration of MSE's undertaking to build

the Project, to pay MSE, beginning on specified dates, whether or not the two units of the Project were then operating, such amounts in addition to funds received from any other source by MSE, as would enable MSE to meet its operating expenses, including interest on debt and depreciation of its investment in the plant at a specified rate. Any payments to be made thereunder by the System Companies would reduce the cost of their future power purchases.

4. The Availability Agreement initially provided that the share of power taken by each System Company from the Project would have varied from time to time relative to the respective needs of each System Company. (PX 1-A) In 1981 the Availability Agreement was amended

(PX 1-C) to fix the allocations of power from the Project to the System Companies in specific percentages rather than the variable allocations contemplated by the original Availability Agreement. These fixed percentages were: AP&L - 17.1%, LP&L - 26.9%, MP&L - 31.3%, and NOPSI - 24.7%. In 1980 South Mississippi Electric Power Association, Inc. agreed to acquire 10% of the Project. All percentage allocations herein refer to percentages of MSE's 90% undivided ownership interest.

5. Later in 1981 the System Companies entered into a Reallocation Agreement (PX 1-E) under which the System Companies agreed to purchase power from the Project in the following percentages:

	Unit No. 1	Unit No. 2
AP&L	0	0
LP&L	38.57	26.23
MP&L	31.63	43.97
NOPSI	29.80	29.80

6. Since MSE's rights under the Availability Agreement had been assigned by it to various financial institutions in connection with the financing of the Project, MSE's creditors would not permit MSE to change the specified percentage allocations in the Availability Agreement to conform with the Reallocation Agreement.

7. The Availability Agreement has been essential to the financing of the Project. Pursuant to a series of ten agreements entered into between 1977 and 1984, MSE has assigned its rights in the

Availability Agreement to secure indebtedness aggregating in excess of $2.5 billion to finance the construction of the Project.

8. In 1982, Unit No. 1 was nearing completion. Pursuant to the requirements of the revised Availability Agreement, MSE entered into an agreement for the sale of power from the Project. (PX 1-F) This agreement, the Unit Power Sales Agreement ("UPSA"), required each System Company to purchase the shares of power specified in the Reallocation Agreement. A&L signed the UPSA but, in accordance with the terms of the Reallocation Agreement, did not agree to purchase any power from the Project. The UPSA was filed with the FERC in June of 1982, for approval as a wholesale

power sales agreement in Docket No. ER82-616-000. The defendants ("APSC") have intervened in and are actively participating in the FERC proceeding relating to the UPSA.

9. In February of 1984, the FERC Administrative Law Judge ("ALJ") approved, after extensive briefing and oral argument, the cost-of-service rate formula with respect to Unit No. 1 as proposed in the UPSA in most material respects. (PX 2) A decision with respect to Unit No. 2 was deferred pending completion of the unit. In his decision, the ALJ did not accept the original allocation contained in the UPSA and has determined a different allocation under which the System Companies would be obligated to purchase

power from Unit No. 1 in the following proportions:

AP&L - 36%

LP&L - 14%

MP&L - 33%

NOPSI - 17%

10. On August 1, 1984, the APSC issued its Order to appear and show cause in Docket No. 84-190-U ("August Order") which directed AP&L to appear and:

> to show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held to be void ab initio as a matter of law. (PX 9)

11. MSE has heavy financing needs at the present time, and over the next few years, to complete Unit No. 1, to refinance maturing long and short term indebtedness and to resume full construction of Unit No. 2. To complete Unit No. 1 MSE must raise approximately $200 million in capital. Debt maturities and sinking fund obligations over the next five years are as follows: 1985, $196.2 million; 1986, $1,738.2 million; 1987, $146.2 million; 1988, $196.2 million; and 1989, $162 million: and MSE's share of Unit No. 2 is presently projected to cost in excess of $3.4 billion ($779 million of which has been invested by MSE in that Unit as of July 31, 1984). (PX 1)

CONCLUSIONS OF LAW

1. In 1935 Congress passed the Federal Power Act, 16 U.S.C. §§ 824 et seq., vesting FERC (then the FPC) with jurisdiction which extends to:

> ...the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. § 201(b)(1)

In enacting the Federal Power Act, Congress intended to vest exclusive jurisdiction in the FERC (formerly FPC) to regulate interstate wholesale utility rates. FPC v. Southern California Edison Co., 376 U.S. 205 (1964).

2. In the Federal Power Act, Congress defined electric power transmitted in interstate commerce as power which is "transmitted from a State and consumed at any point outside

thereof," [§ 824(c)] and wholesale sale as a sale "to any person for reslae" [§ 824(d)]. All matters other than the transmission and wholesale sale of electricity in interstate commerce are left to state regulation [§ 824(a) and (b)].

3. This Circuit has recognized that it is often difficult to draw the distinction between interstate and intrastate power sales. In an integrated system of power production, such as MSU's, this distinction is particularly difficult. Arkansas Power & Light Company v. Federal Power Commission, 368 F.2d 376 (8th Cir. 1966). In this case the subject agreements are inextricably bound to the wholesale sale of power in interstate

commerce, and this court cannot accept the fine line of distinction which defendants seek to draw. The Court of Appeals recently reached a similar conclusion in State of Minnesota, et al v. Federal Regulatory Commission, et al, No. 83-1745 (May 15, 1984), and this decision compels the conclusion I reach today. See also, Southwestern Bell Telephone Company v. Arkansas Public Service Commission, et al, No. 84-1488 (8th Cir. June 7, 1984).

4. The Availability Agreement and amendments thereto are agreements for the purchase of wholesale power in interstate commerce or are so integrally related to such purchases that they are subject to the exclusive jurisdiction of the FERC. The other documents which the

APSC seek to review and regulate are essential to the interstate wholesale sale of power and therefore are not subject to state jurisdiction.

5. MSE must raise an additional several billion dollars in the next few years to pay construction and financing costs. The ability to raise these funds is dependent on the enforceability of the threatened agreements. If the actions of the APSC are not enjoined, the cost of capital to MSE will be raised to the point that the Project is jeopardized, and the ability of MSE to provide its multi-state wholesale customers with power will be irreparably impaired. Moreover, such actions make future cooperation among the other states for the benefit of the entire Middle South System a virtual impossibility.

6. Plaintiff and Plaintiff-Intervenor are entitled to a permanent injunction prohibiting the Arkansas Public Service Commission from continuing its proceedings in APSC Docket No. 84 -190-U.

This 14 day of September, 1984.

_____

HENRY WOODS, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MIDDLE SOUTH ENERGY, INC.,

Plaintiff,

and

ARKANSAS POWER & LIGHT COMPANY,

Plaintiff-Intervenor,

V. No. LR-C-84-778

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER,

Defendants,

and

ATTORNEY GENERAL OF ARKANSAS,

Defendant-Intervenor,

and

RATEPAYERS FIGHT BACK,

Defendant-Intervenor.

ORDER

Defendant Arkansas Public Service Commission seeks amendment of the Court's September 14, 1984 judgment and deletion of paragraph 4 from the Conclusions of Law supporting such judgment. In support of its position, the Arkansas Public Service Commission submits the affidavit of Dr. Keith Berry and Mr. Stephen Berkowitz (although Mr. Berkowitz did not actually sign the affidavit). Plaintiff and Plaintiff-Intervenor have moved to strike this affidavit since (1) one of the affiants is not a signatory, (2) Rule 59 of the Fed.R.Civ.P. does not provide for the submission of affidavits, and (3) they would be denied their right to cross-examine these affiants

that could have been called at the hearing of this matter. While the Court is inclined to agree with the arguments offered in support of the motion to strike, a review of the challenged affidavit reflects that it basically restates the position of the Arkansas Public Service Commission throughout these proceedings and inclusion of this affidavit in the record should not prejudice Plaintiff and Plaintiff-Intervenor.

The Court has reviewed its Findings of Fact and Conclusions of Law in light of the affidavit of Dr. Keith Berry and Mr. Stephen Berkowitz filed in support of defendant's motion and declines to alter or amend the judgment or paragraph 4 of the Conclusions of Law. The record in this case to date, as specifically

found by this court in its Findings of Fact, supports the Conclusion reached in paragraph 4, which the Arkansas Public Service Commission has challenged, and therefore the motion to amend judgment is denied.

Also pending before the Court is the Arkansas Public Service Commission's motion to stay enforcement of the injunction pending appeal. In this motion the Arkansas Public Service Commission merely restates many of the arguments it made in resisting the entry of an injunction. The maintenance of the status quo, which the Arkansas Public Service Commission suggests would be attained by entry of a stay, would have the effect of circumventing the injunction which this court has entered.

The testimony at the hearing of this matter demonstrated that the plaintiff faced a very real threat of irreparable harm in its financing efforts of the nuclear project at issue if the Arkansas Public Service Commission continued with proceedings in its Docket No. 84-190-U. Plaintiff prevailed before this court in attaining the entry of an injunction, and in light of the recent cases cited in this court's September 14, 1984 Order, the plaintiff will likely prevail on an appeal of this matter. Although there is substantial public appeal for the position taken by the Arkansas Public Service Commission, the considerations of the public interest do not tip the equities in favor of a stay of this court's injunction. To the

contrary, a stay of the injunction (as with no entry of an injunction) would have the likely effect of escalating the cost of the Grand Gulf project through increases in the financing of the project to the ultimate detriment of the consuming public.

The Court therefore finds that the equities do not favor the entry of a stay of its September 14, 1984 injunction, and the Arkansas Public Service Commission's motion seeking the same is denied.

This 11 day of October, 1984.

HENRY WOODS, U.S. District Judge

ARKANSAS
PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN ORDER FOR ARKANSAS POWER & LIGHT COMPANY TO APPEAR AND SHOW CAUSE WHY CERTAIN AGREEMENTS SHOULD NOT BE HELD TO BE VOID AB INITIO	DOCKET NO. 84-190-U ORDER NO.

ORDER TO APPEAR AND SHOW CAUSE

By Ark. Stat. Ann. § 73-202 (Repl. 1979), this Commission is given the duty to supervise and regulate every public utility (as defined in Act 324 of 1935) and to do everything necessary or expedient in the exercise of that duty. Pursuant to Rule 10 of the Commission's Rules of Practice and Procedure and in the course of its duty to supervise and

regulate the public utilities of this State, the Commission issues this Order to Appear and Show Cause to Arkansas Power & Light Company (AP&L).

It has come to the attention of the Commission that Arkansas Power & Light Company (AP&L) has, over the course of the past several years, entered into or has been otherwise involved in a series of agreements purporting to establish rights, obligations, and/or duties for AP&L with respect to a portion of the investment and operating costs of the Grand Gulf Nuclear Generating Units I and II (the Grand Gulf Project) located near port Gibson, Mississippi. In addition, purported rights, duties, and responsibilities of AP&L with respect to Grand Gulf have arguably been unlawfully

impacted by certain agreements among other parties, including: Middle South Utilities, Inc. (MSU); Middle South Energy, Inc. (MSEI); Arkansas-Missouri Power Company (Ark-Mo); Louisiana Power & Light Company (LP&L); Mississippi Power & Light Company (MP&L); and New Orleans Public Service, Inc. (NOPSI); and various financial institutions.

1. Those agreements include, but are not necessarily limited to the following contracts, each of which is incorporated by express reference as if set out fully herein word by word.

A. The Availability Agreement of June 21, 1974 between MSEI, AP&L, Ark-Mo, LP&L, MP&L, and NOPSI wherein AP&L agreed to purchase power from the Grand Gulf Units and to make certain

payments to MSEI pursuant thereto (according to the capability equalization formula under the 1973 System Agreement), whether or not the units ever become operational or produce power at any time.

B. The Bank Loan Agreement of June 21, 1974, wherein certain banks severally agreed to make loans to MSEI in an aggregate amount up to $308,500,000 in order to finance the design and construction of the Grand Gulf Project.

C. The Capital Funds Agreement of June 21, 1974, between MSU and MSEI which provides that MSU will purchase from MSEI 40,000 shares of the common stock of MSEI and that MSEI will complete construction of the Grand Gulf

Project and provide power to the operating companies pursuant to the Availability Agreement of June 21, 1974, and the Systems Agreement of April 16, 1973.

D. The First Amendment of Bank Loan Agreement of December 29, 1975, wherein the aggregate amount of loans available to MSEI under the Bank Loan Agreement was increased to $353,500,000.

E. The Second Amendment of Bank Loan Agreement of August 5, 1976, wherein the aggregate amount of loans available to MSEI under the Bank Loan Agreement was increased to $465,000,000.

F. Mortgage and Deed of Trust dated as of June 15, 1977, (Original Indenture) between MSEI, United States

Trust Company of New York, and Malcolm J. Hood, Trustee.

G. First Supplemental Indenture dated as of June 15, 1977.

H. The First Amendment to the Availability Agreement of June 30, 1977, wherein commencement of commercial operation of Unit No. 2 of the Grand Gulf Project was deferred to a date not later than December 31, 1986.

I. The Amended and Restated Bank Loan Agreement of June 30, 1977, under which certain banks made loans to MSEI in the aggregate principal amount of $565,000,000.

J. The First Assignment of Availability Agreement, Consent and Agreement dated June 30, 1977, wherein MSEI assigned to the agent of certain

banks, for the benefit of said banks, as collateral security for the above loans, various rights of MSEI under the Availability Agreement.

K. The first Supplementary Capital Funds Agreement and Assignment of June 30, 1977, wherein MSU and MSEI supplemented their undertakings under the original Capital Funds Agreement.

L. The Second Supplementary Capital Funds Agreement and Assignment of June 30, 1977.

M. The Third Supplementary Capital Funds Agreement and Assignment of January 1, 1980.

N. Second Supplemental Indenture dated as of January 1, 1980.

O. The First Amendment to Amended and Restated Bank Loan Agreement

dated as of March 20, 1980, which increased to $800,000,000 the amount of the loans to be made by said banks to MSEI.

P. The Fourth Assignment of Availability Agreement, Consent and Agreement dated March 20, 1980, wherein MSEI's same rights, benefits, terms and conditions under the original Availability Agreement were further assigned as collateral security for the loans made under the Amended and Restated Agreement as amended by the First Bank Loan Amendment.

Q. The Fourth Supplementary Capital Funds Agreement and Assignment of March 20, 1980, wherein MSU and MSEI further supplemented their undertakings under the Capital Funds Agreement for

the U. S. Bank Agent and the banks under the Amended and Restated Agreement as amended by the First Bank Loan Amendment.

R. The Second Amendment to the Availability Agreement dated June 15, 1981, which allocates 17.1% of the Grand Gulf Project to AP&L and obligates AP&L to make payments to MSEI based on this allocation.

S. The Second Amended and Restated Bank Loan Agreement of June 15, 1981, which provided for the making of revolving credit loans by the banks to MSEI from time to time in an aggregate amount not in excess of $1,311,000,000 at any one time outstanding.

T. The Fifth Assignment of Availability Agreement, Consent and

Agreement dated June 15, 1981, wherein MSEI assigned to the agent of certain banks, for the benefits of said banks, in order to create a security interest for loans made under the Second Amended and Restated Agreement in favor of the agent on behalf of the banks, all of MSEI's rights to receive all monies paid or to be paid to the MSEI pursuant to Section 4 of the Availability Agreement.

U. The Fifth Supplementary Capital Funds Agreement and Assignment of June 15, 1981, wherein MSU and MSEI further supplemented their undertakings under the Capital Funds Agreement for the U. S. Bank Agent and the banks under the Second Amended and Restated Agreement.

V. The Power Purchase Advance Payments Agreement of June 15, 1981, between MSEI and AP&L, LP&L, MP&L, and NOPSI which provides that if Grand Gulf I has not been completed by December 31, 1983, the MSU operating companies must begin payments, in accordance with a fixed percentage rate, to MSEI on January 2, 1984, for power to be delivered from Grand Gulf I.

W. Third Supplemental Indenture dated as of June 15, 1981.

X. The Loan Agreement of February 5, 1982, in which the aggregate amount of loans available to MSEI from certain foreign banks is $315,000,000 at any one time until the "Term Date: which shall be the earlier of (1) December 31, 1983, or (2) the date on which

the first until (sic) of the project is placed in commercial operation.

Y. First Amendment of the Second Amended and Restated Bank Loan Agreement of February 5, 1982.

Z. The Sixth Supplementary Capital Funds Agreement and Assignment of February 5, 1982.

AA. The Sixth Assignment of Availability Agreement, Consent and Agreement of February 5, 1982, which provides for the assignment by MSEI of MSEI's rights under the Availability Agreement to the agent of the banks.

BB. First Amendment of Foreign Bank Loan Agreement dated February 18, 1983.

CC. Second Amendment of the Second Amended and Restated Bank Loan Agreement of June 30, 1983.

DD. Second Amendment of Foreign Bank Loan Agreement dated December 30, 1983.

EE. Third Amendment of Second Amended and Restated Bank Loan Agreement dated December 30, 1983.

FF. Fourth Supplemental Indenture dated as of June 1, 1984.

GG. Third Amendment of Foreign Bank Loan Agreement dated June 28, 1984.

HH. Fourth Amendment of Second Amended and Restated Bank Loan Agreement dated June 28, 1984.

II. Third Amendment of the Availability Agreement dated June 28, 1984.

JJ. First Amendment of the Power Purchase Advance Payment Agreement dated June 28, 1984.

2. The construction of the Grand Gulf Project was and is dependent on the agreements enumerated above. Those agreements obligate MSEI to repay the bank loans that finance the construction of the generating plants. Additionally, those agreements obligate AP&L, LP&L, MP&L and NOPSI to pay MSEI for the construction and finance costs of the Grand Gulf Project. Under the agreements and various amendments thereto and assignments thereof, if MSEI defaults on its obligations, the banks possess all the rights of MSEI to receive payment directly from the four operating subsidiaries of MSU, including AP&L.

3. Pursuant to Ark. Stat. Ann. § 73-253 (Repl. 1979), a public utility

may not "sell, acquire, lease or rent any public utility plant or property constituting an operating unit or system" without the consent and approval of the APSC. Further, any such transaction made without APSC approval shall be void.

4. AP&L has never sought nor received the consent and approval of the APSC for the agreements purporting to obligate it to lease a fixed share of the Grand Gulf Project. When it entered into such agreements, AP&L may, therefore, have violated the provisions of Ark. Stat. Ann. § 73-253 (Repl. 1979).

5. Pursuant to Ark. Stat. Ann. § 73-255 (1983 Cum. Supp. to Repl. 1979), a public utility may not "...issue stock, bonds, notes or other

evidence of indebtedness payable at periods or more than thirty-six (36) months ..." without authorization from the APSC.

6. The agreements entered into by AP&L obligating it to assume a fixed share of the indebtedness of MSEI or the costs of the Grand Gulf Project may constitute evidence of indebtedness under Ark. Stat. Ann. § 73-255, which provides further that any such indebtedness issued without APSC authorization shall be void.

7. AP&L has never sought nor received the authorization of the APSC to assume any share of the indebtedness of MSEI for the costs of the Grand Gulf Project; when it entered into such contractual agreements, therefore, AP&L

may have violated the provisions of Ark. Stat. Ann. § 73-255 and § 73-238.

8. After reviewing the above-noted documents and after hearing testimony in APSC Docket No. 84-040-011, this Commission concludes that the obligations purportedly imposed upon AP&L by some or all of the above agreements constitute prima facie violations of Ark. Stat. Ann. §§ 73-238, 253, and 255 (Repl. 1979). On its face and as a whole, the entry of AP&L and other parties into the agreements noted above indicate an intent to violate the Arkansas statutes designed to provide protection to the ratepayers of a public utility from that utility's intemperate decisions and unlawful actions.

IT IS, THEREFORE, ORDERED THAT:

Arkansas Power & Light Company is directed to appear before this Commission at a hearing scheduled for Friday, August 31, 1984, at 9:00 A.M., in the Hearing Room of the Commission, First Floor, 1000 Center, Little Rock, Arkansas, to show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held to be void ab initio as a matter of law.

Pursuant to Ark. Stat. Ann. §73-237 (Repl. 1979), the burden of proof in this proceeding shall be upon AP&L, as the party seeking to avoid compliance with the provisions of Act 234 of 1935

and amendments thereto. If AP&L fails to meet its burden of proof in this proceeding, the Commission will take such actions as are necessary and permissible under Ark. Stat. Ann. § 73-238 (Repl. 1979) to ensure that AP&L is released from any obligations or duties imposed by contracts found to be void and that its ratepayers are shielded from any liability on account of its unlawful contractual arrangements.

BY ORDER OF THE COMMISSION

This 1st day of August, 1984.

Dr. Robert E. Johnston,

Chairman

James W. Daniel, Commissioner

Patricia S. Qualls,

Commissioner

1. U. S. Const., Ark. I, § 8, cl. 3.

> Powers of congress. [1.] The congress shall have power
>
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

2. Federal Power Act, 16 U.S.C. §§ 824(a) & (b), 824c(f), 824d(a), and 825q.

> § 824(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

§ 824(b). The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

§ 824c(f). The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

§ 824d(a). Rates and charges; schedules; suspension of new rates. (a) All rates and charges made, demanded, or received by any public

utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonalbe is hereby declared to be unlawful.

§ 825q. Conflict of jurisdiction.

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of sections 79 to 79z-6 of Title 15 or of a rule, regulation, or order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of sections 79 to 79z-6 of Title 15 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of sections 79 to 79z-6 of Title 15, in which case the

requirements of this chapter shall apply to such person.

3. Public Utility Holding Company Act, 15 U.S.C. §§ 79a(b)(1), 79a(c), 79b(a)(16), 79d(a) and (b), 79g(a), (b) & (g), and 79u.

§ 79a. Necessity for control of holding companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H.Res. 59 (Seventy-second Congress, first session) and H.J.Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected --

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; . . .

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which unless regulated, is injurious to investors, consumers, and the general public; and it is declared to be the policy of this chapter, in accordance with which policy all the provisions of this chapter shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter.

§ 79b(a)(16). "Security" means any note, draft, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, receiver's or trustee's certificate, or, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, assumption of liability on, or warrant or right to subscribe to or purchase, any of the foregoing.

§ 79f(a). Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of

the holders of an outstanding security of such company.

(b)... The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business.

§ 79g. Declarations by registered companies in respect to security transactions.

(a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 79f of this title, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for protection

of investors or consumers. Such declaration shall include

. . .

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the commission shall fix by rules and regulations or order, unless the commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration sould become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the

Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

§ 79u. Effect on other laws.

Nothing in this chapter shall affect (1) the jurisdiction of the Commission under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934 over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this chapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

4. Arkansas Statutes Annotated

§§ 73-238, 73-254, and 73-255.

73-238. Contracts in violation of act void - Cancelation and recoupment. - Any contract made in violation of this Act, or any lawful order of the Department [Commission], shall be void and subject to cancelation and recoupment by action in any court of competent jurisdiction. Where a contract is made contrary to the provisions of this Act, or any lawful order of the Department [Commission], the Department [Commission] may, after notice and hearing, order the public utility to take steps within ten [10] days to recover the funds, or assets thus illegally loaned or transferred, by action in a court of competent jurisdiction, or to take such other proceedings as may be effective to release the public utility from any such contract.

73-254. Issuance of stocks and bonds and creation of liens under supervision of commission. - The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidences of indebtedness, in case of public utilities incorporated under the laws of this state, and to create liens on property in this state, in case of public utilities incorporated under the laws of any state or foreign

country, is a special privilege, the right of supervision, regulation, restriction and control of which is, and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the Department [Commission] may prescribe.

73-255. Stock or evidence of indebtedness issued under authority of commission - Amount of issue and application of proceeds fixed - Exception - Limitation on amount of issue - Accounting for proceeds. - A public utility may, when authorized by order of the Commission, and not otherwise, issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than thirty-six [36] months after the date thereof when necessary for the acquisition of property, the construction, extension or improvement of its facilities or the improvement of its service, or for the discharge of lawful refunding of its obligations, or reimbursement of moneys actually expended from the income from any source, or for any of such purposes. The order of the Commission shall fix the amount of any such issue and the purposes to which it or its proceeds are to be applied. No such public utility shall, without the consent of the Commission, apply any such issue or its proceeds to any purpose not

specified in the order. Such public utility may issue notes for proper corporate purposes and not in violation of any provision of this Act, or of any other act, payable at periods of not more than thirty-six (36) months, without the consent of the Commission; but no such note, in whole or in part, shall be refunded by any issue of stock or bonds or by any evidence of indebtedness, with maturity date later than thirty-six (36) months from date of issue, without the consent of the Commission.

The Commission shall have no power to authorize the issuance of stocks, notes, bonds or other evidences of indebtedness of any public utility in aggregate amount at any time exceeding the fair value of the properties of the issuer and the reasonable cost of the issuance and sale of such issues. The Commission shall have power to require every public utility, other than municipalities, to account for the disposition of the proceeds of all sales of stocks, bonds, notes or other evidences of indebtedness, in such form and detail as it may deem advisable, and to establish such rules and regulations as it may deem necessary to insure the disposition of such proceeds for the purpose specified in its order.

No provision of this Act, and no deed or act done or performed under or in connection therewith shall be

construed to obligate the State of Arkansas to pay or guarantee, in any manner whatsoever, any stock, bond, note or other evidence of indebtedness, authorized, issued or executed under the provisions of this Act.

All securities issued without the approval of the Commission shall be void.

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-895

RATEPAYERS FIGHT BACK,

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.,
ARKANSAS POWER & LIGHT CO.,
ARKANSAS PUBLIC SERVICE,
COMMISSION ATTORNEY GENERAL
OF ARKANSAS,

RESPONDENTS

MEMORANDUM OF RESPONDENT ARKANSAS PUBLIC SERVICE COMMISSION IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

Respondent Arkansas Public Service Commission (hereafter "the Commission" or "APSC") herewith files its memorandum of response to the prayer of Petitioner that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals entered on August 23, 1985. For the purpose of this response and in explanation of its position, the Commission accepts and adopts by reference the jurisdictional statement, statement of constitutional and statutory provisions involved, statement of the case, and the reasons for granting the writ contained in the Petition. As explained more fully below, the Commission questions its ability to take a position in support of the granting of the petition or to file a petition itself, though it might wish to do so in

normal circumstances. But, having been made a respondent through the actions of Petitioner RFB and as the party enjoined by the order of the District Court, as affirmed by the Court of Appeals, the Commission must affirmatively declare in this response that the questions presented by the petition are of such import to the people of Arkansas and have such implications for the laws of Arkansas that, in the event the Court should grant the Petition, the Commission would have no choice but to reassert the legal positions it has consistently taken in this litigation since it was sued by respondent Middle South Energy in August 1984.

The Rules of the Supreme Court do not address in specific terms the question whether a respondent may preserve its rights to brief and make oral argument

without taking a definite position for or against the granting of a petition for a writ of certiorari. In light of this uncertainty in the Rules, if the Commission, as a respondent herein, is required by the Rules of the Court to declare either support for or opposition to the Petition at this time in order to preserve its rights to brief and argue the case, should certiorari be granted on the basis of the RFB Petition, then the Commission urges this honorable Court to consider this memorandum to be in support of rather than in opposition to the granting of the petition. The Commission believes that the statement of position which follows will enlighten the Court as to the unusual circumstances surrounding this case and the reasons why the Commission must couch its position on the granting of the petition in the alternative.

RESPONDENT'S STATEMENT OF POSITION

Following the August 23, 1985, affirmance of the District Court decision by the three-judge panel, the APSC on September 5, 1985, filed a Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc by the Eighth Circuit. (APSC Ex. A). During the last week of August and first week of September 1985, representatives of the Staff of the Commission, the Attorney General of Arkansas, and Arkansas Power & Light Co. (AP&L), as well as other industrial intervenors who were parties to a vigorously contested AP&L retail rate case pending before the APSC in its Docket No. 84-249-U, entered into intensive negotiations which resulted in the submission to the APSC on September 5, 1985, of a Stipulation and Settlement Agreement (APSC Ex. B). After

several days of deliberation on the proffered settlement, the Commission on September 9, 1985, entered its Order No. 26 in Docket No. 84-249-U (APSC Ex. C), approving the stipulation and settlement agreement in the public interest. Retail rates reflecting the terms of the settlement became effective on and after September 9, 1985.

Paragraph 7 of the approved Stipulation and Settlement Agreement (APSC Ex. B at pp. 30-32) provided that all of the parties to the settlement negotiations (APSC Staff, Arkansas Electric Energy Consumers, Southern Cotton Ginners Association, Attorney General of Arkansas, Reynolds Metals Company, and AP&L) "except AP&L agree to take such action as may be necessary to voluntarily dismiss without prejudice, terminate or withdraw their interventions

in" twelve state and federal regulatory and court proceedings then pending which involved the APSC and AP&L, including the case at bar herein. (Id. Emphasis added.)

As also provided by Paragraph 7 of the Settlement Agreement, AP&L agreed "to take such action as may be necessary to voluntarily dismiss without prejudice, or terminate" litigation it had brought against the APSC in state and federal court in three other cases. (Id.) The Settlement Agreement further provided:

> Each of the parties agrees that it will not refile or reinstitute such litigation or other litigation raising similar issues on any of the same facts so long as this Agreement remains in effect. The parties agree that this Settlement Agreement is expressly contingent upon the Commission making the necessary findings in its order approving this Settlement Agreement that it will (a) voluntarily dismiss without prejudice, terminate, or withdraw its intervention in the litigation listed above in which the Commission is a party or

> participant and that it will not refile or reinstitute such litigation as long as this Agreement remains in effect, and (b) take such action as may be necessary to close the Commission Dockets listed above. The continued effectiveness of this Settlement Agreement is also expressly contingent upon the Commission taking such action as may be necessary to terminate or dismiss such proceedings. . . .

Id.

Although the Commission, as an institution of state government, and its commissioners, as individuals, were not participants in or "parties" to the settlement negotiations or the Stipulation and Settlement Agreement,[1] the APSC in furtherance of its Order No. 26 approving the settlement, withdrew

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[1]The Commission's Staff, under the direction of the Commission's Executive Director, was a party to the rate case and the negotiations leading to the settlement; the Staff and its Director acted without the direction or involvement of the commissioners.

the Petition for Rehearing it had filed with the Court of Appeals on September 5, 1985 (APSC Ex. C).

Petitioner Ratepayers Fight Back (RFB) was not a party to either AP&L's retail rate case (APSC Docket No. 84-249-U) or the Stipulation and Settlement Agreement approved by the Commission in resolution of that case.

Consequently, RFB was not and is not bound by the terms of the settlement or the APSC Order No. 26 approving it insofar as they pertained to dismissal of certain legal proceedings and the termination of litigation involving AP&L and the APSC. Thus, on November 21, 1985, RFB filed the instant petition for a writ of certiorari, which was served on the APSC on November 22, 1985.

Although not by definition a "party" to the Stipulation and Settlement

Agreement, the APSC considers that its withdrawal of the Petition for Rehearing by the Court of Appeals was an action consistent with the terms and spirit of the approved settlement.

However, in accepting the Stipulation and Settlement Agreement, the Commission expressly did not agree to abdicate its statutory duty to regulate AP&L or to shirk its responsibility to set just and reasonable rates by interpreting and enforcing the laws of Arkansas. (See APSC Ex. C at p. 41). To the extent that the performance of that responsibility entails responding to legal proceedings initiated by others, such as petitioner herein, the APSC does not view the expression of its position as violative of either the spirit or the letter of the Stipulation and Settlement Agreement or its order approving it. Nothing the APSC

could do or has done since its approval of the Settlement Agreement on September 9, 1985, could have negated the right of Petitioner RFB to pursue its lawful right to seek review by this honorable Court of the Court of Appeals decision. The Commission simply has no power to "dismiss" or terminate" the litigation in this case.

In this case the Commission was the party enjoined by the District Court to terminate all proceedings involving the review of certain financial agreements entered into by MSE and AP&L. Notwithstanding the unique posture in which the APSC now finds itself -- having with openly-stated reluctance approved the retail rate case settlement agreement and acted in furtherance of the settlement by withdrawing its previously-filed Petition for Rehearing

by the Court of Appeals -- there is no doubt that the Commission and the State of Arkansas have a direct and palpable interest in the outcome of this litigation if certiorari should be granted. For example, while it is clear that under the current state of the law in the Eighth Circuit, the APSC may not resume hearings or proceedings in its now closed Show-Cause docket which was enjoined by the District Court,[2]

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[2] See APSC Ex. C at 19, in which the Commission discussed the Hobson's choice with which it was presented in considering the settlement agreement: "Although the Commission believes that interpretations of the courts in the Eighth Circuit do not constitute the appropriate legal standard, it must acknowledge them and must recognize the dangers inherent in the applications of these standards to the actions of this Commission on the issues before it. Therefore, in order to assure some protection to Arkansas ratepayers, rather than risk the strong possibility of no protection for those ratepayers, the Commission has little choice but to accept the Stipulation as submitted." (Emphasis in original.)

nothing would "legally" preclude the APSC from exercising the option to reopen that docket, which option would be created in the event this Court were to grant certiorari and reverse the decision of the Eighth Circuit.[3] Similarly, while under the current state of the law the Commission would not undertake any new investigations or open new dockets which violate the teachings of the Court of Appeals, nothing "legally" would prevent the Commission from engaging in such proceedings in the future if this court

---

[3]The Commission wishes it to be clearly understood that, in discussing the option that would be created if the Court of Appeals were to be reversed, it is in no way signalling that it would reopen the Show-Cause docket. Any decision on that point would, of course, depend entirely upon the course of future events, and the Commission would take into account the terms of the Stipulation and Settlement Agreement, as well as its Order No. 26 approving the settlement, in evaluating such an option.

were to grant certiorari and reverse the Eighth Circuit. The preceding points are made in anticipation of arguments from respondents AP&L and MSE that the issues raised by petitioner herein are moot, owing to the fact that the Commission has, in the wake of its approval of the settlement agreement, closed certain dockets, including the enjoined Show-Cause proceeding. In summary, more is at stake here than the specific Show-Cause proceedings which were enjoined by the District Court. The Commission, by accepting a settlement in an AP&L retail rate case, did not erase from the laws of Arkansas those statutes which require it to review and approve the issuance by public utilities of stocks, bonds, and evidence of indebtedness. Thus, even if this Court were to change the current state of the

law by reversing the Court of Appeals, and thereafter the APSC decided not to reopen the show-cause docket involving AP&L, the decision of the Supreme Court would have nonetheless preserved to the Commission and the people of Arkansas those laws enacted by its legislature calling for APSC scrutiny of the financial obligations and securities of all public utilities operating in the state. In summary, the APSC does not believe that all legal issues raised by the petition are moot simply because a settlement agreement was reached by the parties to a specific AP&L rate case and approved by the Commission.

To underscore the anomalous nature of this case, it need only be pointed out that AP&L is not bound to silence on the petition by the settlement agreement, nor is it obligated in any way to refrain

from opposing the granting of a writ, which it can be expected to do. Neither is MSE precluded from taking any position it chooses, since it was not a party to either the retail AP&L rate case or the settlement agreement.

Nothing in the Stipulation and Settlement Agreement proscribes APSC participation in ongoing litigation or requires the Commission to stand silent in this case in which it remains the enjoined Defendant.[4] The Commission has not "refiled" or "reinstituted" this litigation; the litigation has simply not been concluded, owing to the independent actions of a third party not bound by the settlement agreement, the APSC order

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[4]Nor does the settlement purport to require the Commission to raise no defense to future actions seeking to enjoin APSC enforcement of the statutes in question.

approving it, or the Commission's decision to withdraw its request for rehearing by the court of appeals. Nor is the pursuit of review by petitioner a "refiling" or "reinstitution" of litigation, but rather it constitutes the timely and regular exercise by RFB of its lawful right to seek review by this court.

As both a respondent herein and the party enjoined by order of the District Court, as affirmed by the Eighth Circuit, the APSC is inextricably involved in this litigation notwithstanding its approval of the settlement. The Commission would have no choice but to enunciate its position on the questions presented and defend its jurisdiction in the interests of the citizens of Arkansas, should the Court grant the Petition for a writ of certiorari. While the Commission believes that the letter and the spirit

of the Settlement Agreement and its order approving it would have precluded the APSC itself from filing a Petition for a writ of certiorari, it would be nonsensical to think that if the writ were granted only the plaintiff/ plaintiff-intervenor (MSE/AP&L) and the defendant-intervenor (RFB) could file briefs and make oral argument concerning laws of the State of Arkansas which the defendant (APSC) is statutorily charged to interpret and enforce.

In summary, the APSC considers it its duty and obligation, now that the litigation has been resumed through the independent actions of a third party, to respond to the petition by stating it will reassert its original positions in this case on brief and in oral arguments if the Court grants the Petition. To pursue other courses, such as waiver of

participation, filing in opposition to the Petition, or total inaction, would be irresponsible in light of the Commission's statutory duties and obligations. Now that the Commission is faced with the fact that litigation filed against it by MSE and AP&L may have renewed vitality, the APSC can do no less than declare that, should certiorori be granted, it will articulate and defend its positions on the questions presented, which the Commission cannot deny are questions of exceptional public importance.[5]

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[5]The Commission notes that on December 9, 1985, the Supreme Court agreed to hear argument in Nantahala Power & Light Co. v. North Carolina Utilities Commission, Docket No. 85-568, which appears to present related and similar issues involving conflicting federal and state jurisdiction over electric utilities.

CONCLUSION

For the foregoing reasons, the APSC prays that this honorable Court accept this statement of position and permit all parties to participate in briefing and oral argument of the questions presented, should the writ be granted. In the alternative, if the Commission must under the Rules of the Court take a position in support of or in opposition to the Petition in order to preserve its rights to participate in briefing and oral argument, the Commission prays that the Court consider this reponse to be in support of the petition.

Respectfully submitted,

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Webster L. Hubbell
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By: _____
Walter W. Nixon, III
Special Counsel to Arkansas
Public Service Commission

CERTIFICATE OF SERVICE

I, Webster L. Hubbell, do hereby certify that I served a true and correct copy of the above and foregoing Petition For a Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit, with Appendix, by regular mail, postage prepaid, on the 21st day of November, 1985, to the following:

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Little Rock, Arkansas 72201

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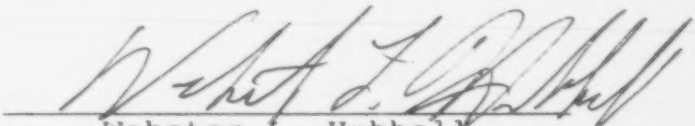

Webster L. Hubbell

AFFIDAVIT

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

I, Webster L. Hubbell, after being duly sworn state as follows:

1. I am a member in good standing of the United States Supreme Court Bar.

2. I am a partner in the Rose Law Firm, counsel of record, for The Arkansas Public Service Commission.

3. On Thursday, December 12, 1985, an original and forty (40) copies of the Memorandum of Respondent Arkansas Public Service Commission in Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was forwarded to the Honorable Alexander L. Stevens, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543 by Federal Express mail.

WITNESS my hand on this 12th day of December, 1985.

Webster L. Hubbell
Counsel of Record

ACKNOWLEDGMENT

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

On this day before me, a Notary Public, duly commissioned, qualified and acting within and for the State and County aforesaid, appeared in person, Webster L. Hubbell, to me well known, and stated that he had executed the foregoing instrument for the consideration and purposes therein mentioned and set forth.

WITNESS my hand and seal as such Notary Public on this 13th day of December, 1985.

Martha Williamson
Notary Public

My Commission Expires:

9-17-90

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-895

RATEPAYERS FIGHT BACK,

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.,
ARKANSAS POWER & LIGHT CO.,
ARKANSAS PUBLIC SERVICE,
COMMISSION ATTORNEY GENERAL
OF ARKANSAS,

RESPONDENTS

APPENDIX TO MEMORANDUM OF RESPONDENT
ARKANSAS PUBLIC SERVICE COMMISSION
IN RESPONSE TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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APSC Exhibit A--Petition for Rehearing By Panel and Suggestion for Rehearing En Banc by the Eighth Circuit Court of Appeals, Docket Nos. 84-2356-EA, 84-2409, 84-2410, and 84-2480

APSC Exhibit B--Stipulation and Settlement Agreement in APSC Document No. 84-249-U

APSC Exhibit C--Arkansas Public Service Commission Order No. 26 in Docket No. 84-249-U

APSC EX. A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 84-2356-EA, 84-249,
84-2410, AND 84-2480

MIDDLE SOUTH ENERGY, INC. and
ARKANSAS POWER AND LIGHT COMPANY,

Appellees

vs.

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSTON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER

and

ATTORNEY GENERAL OF ARKANSAS;
RATEPAYERS FIGHT BACK,

Appellants

Appeal From
United States District Court
For the Eastern District of Arkansas
Western Division

HONORABLE HENRY WOODS
District Judge

PETITION FOR REHEARING BY PANEL
AND SUGGESTION FOR REHEARING EN BANC

VINCENT FOSTER, JR.
CAROL S. ARNOLD
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A Professional Association
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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court. These Supreme Court decisions include: New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); and Ark. Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance: Does the Commerce Clause permit the State of Arkansas to regulate the securities and

evidences of indebtedness of a public utility operating within its borders?

_____
Vincent Foster, Jr.

_____
Carol S. Arnold

Attorneys of Record
for Arkansas Public
Service Commission
and Its Commissioners

STATEMENT OF THE CASE

This appeal is from the judgment of the District Court of the Eastern District of Arkansas entered on September 14, 1984, permanently enjoining Appellant Arkansas Public Service Commission ("APSC or "the Commission") and its individual commissioners from conducting an administrative proceeding involving financing documents executed by Appellee, Arkansas Power & Light Company ("AP&L").

AP&L is a public utility operating in Arkansas and is a wholly-owned subsidiary of Middle South Utilities, Inc. ("MSU"). MSU is a holding company subject to the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 et seq. In February, 1974, MSU organized a subsidiary, Middle South Energy, Inc. ("MSE"), to facilitate the financing and

construction of a two-unit nuclear generating plant to be located in Port Gibson, Mississippi (hereafter "the Grand Gulf project"). The sole asset of MSE, a wholly-owned subsidiary of MSU, is a 90% undivided interest in the Grand Gulf Project. The capacity of Grand Gulf has been allocated among AP&L and MSU's affiliate operating companies in Louisiana and Mississippi by an order of the Federal Energy Regulatory Commission ("FERC").

The financing of the Grand Gulf Project was accomplished through a series of agreements involving MSU, MSE, AP&L, MSU's other affiliated operating companies, and third party lenders. These agreements were filed with the Securities and Exchange Commission ("SEC") as required by the Holding Company Act. Although AP&L executed a

number of these agreements, AP&L failed to seek approval of any of these agreements with the APSC required by Arkansas law. Ark. Stat. Ann. § 73-255.

On August 1, 1984, the APSC initiated a proceeding directing AP&L to appear and show cause why the agreements obligating AP&L in connection with the Grand Gulf project should not be held void on the grounds that AP&L failed to seek prior approval of these agreements from the Commission.

A hearing was set in the show-cause proceeding, and AP&L submitted the requested documents and written testimony to the APSC. Before the hearing took place, MSE filed suit in District Court to enjoin the Commission from proceeding. The District Court entered judgment enjoining the Arkansas Commission from proceeding, and this

appeal followed.

After reviewing the briefs of the parties and hearing oral arguments, the panel[1] entered its opinion and judgment on August 23, 1985. The Court of Appeals affirmed the District Court's judgment, holding that the Arkansas Commission's action constituted a direct and substantial burden on interstate commerce. Middle South Energy Inc. v. Arkansas Public Service Commission, et al., Slip Op. No. 82-2409, 84-2410, 84-2480 (8th Circuit, August 23, 1985). Because the Arkansas Commission holds the good faith belief that the Court's decision conflicts with Supreme Court cases interpreting the Commerce Clause, Appellants now petition for rehearing of

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[1]The panel consisted of Circuit Judges Gibson and Ross and Senior District Judge Meredith.

the case and request a rehearing en banc pursuant to Rules 40 and 35(b) of the Federal Rules of Appellate Procedure and Rules 15 and 16 of the 8th Circuit Rules of Appellate Procedure.

ARGUMENT

THE COMMERCE CLAUSE PERMITS THE STATE OF ARKANSAS TO REGULATE THE SECURITIES AND EVIDENCES OF INDEBTEDNESS OF ARKANSAS POWER & LIGHT CO.

A. The Show-Cause Proceedings are Neutral in Their Impact.

The Arkansas Commission is empowered by statute to authorize the issuance of securities and evidences of indebtedness of public utilities operating within the State, and no issuances may be made without the Commission's approval. Ark. Stat. Ann. §§ 73-254, 73-255 (1979 Repl.) The APSC shares concurrent jurisdiction over the securities of AP&L

with the SEC under the Public Utility Holding Company Act, which provides:

> Nothing in this chapter . . . shall . . . affect the jurisdiction of any other commission . . . of any state or political subdivision of any state, over any person, security or contract, insofar as such jurisdiction does not conflict with the provision of this chapter or any rule, regulation, or order thereunder. 15 U.S.C. §79u.

The Holding Company Act further prohibits the SEC from approving any acquisition of securities "unless it appears to the satisfaction of the Commission that such state laws as may apply in respect of such acquisition have been complied with." 15 U.S.C. §79j(f).

The SEC has specifically recognized the APSC's authority over AP&L's financial commitments in connection with the Grand Gulf project. Middle South Utilities, Inc., SEC Holding Company Act

Release No. 23495 (November 23, 1984). In addition, by enacting the concurrent jurisdiction terms of the Holding Company Act, "Congress recognized that state securites regulation would have some effect on federal regulation of interstate rates and had no intent to eliminate that effect." Indiana and Michigan Power Company v. State of Michigan, 279 N.W.2d 450 (Mich. 1979).

The issue presented to this Court was the difficult question of whether the APSC was preempted from reviewing AP&L's financing obligations by the Federal Power Act, as the District Court found, or whether the APSC and the SEC share exclusive jurisdiction over the agreements.

The Court, however, avoided resolving the preemption question and instead applied a Commerce Clause analysis,

finding that the Arkansas Commission had a discriminatory purpose. "Arkansas . . . seeks to close its borders to high-cost electricity," the Court concluded, and this creates "a preference for citizens in the regulatory jurisdiction gained at the expense of out-of-state customers." Opinion, at 23.

The District Court below never made any such finding as to the intent or purpose of the APSC. The APSC, represented at trial by its staff attorneys, was not on notice that it should present evidence on this issue or that it might later be charged by an appellate court with discriminatory intent. Only one witness was presented to the District Court, he being an economic witness offered by MSE. There was not one word of testimony by this witness or anyone else on the intent of

the APSC. The judge asked no questions about the APSC's purposes. No questions were asked about intent on cross-examination. The entire hearing took less than an afternoon and the transcript is only 73 pages long. The Court can scan the transcript and find not a word regarding the APSC's purpose.

MSE's Complaint filed in the District Court is also silent on the issue. While the jurisdictional paragraph gives a passing nod to the commerce clause, the Complaint never alleges that the APSC proceeding was motivated by discriminatory intent or purpose.

This Court apparently made its novel finding as to the APSC's purposes by referring to the massive exhibits which AP&L and MSE placed into evidence at trial. These consist of the financing documents themselves, but also include

public filings, pleadings, newspaper articles, and the like. With the benefit of hindsight, the APSC's trial attorneys would in all likelihood challenge this attempt to load up the record since the District Court hearing was clearly directed at the preemption issue alone.

This Court's finding of discriminatory intent is the starting point of its entire Commerce Clause analysis. Since this issue is critical, a constitutional interpretation of this magnitude should be based on a fully developed record. The APSC should have the opportunity to rebut any allegation of discriminatory intent and address the issue fully. By leaping to the conclusion it reached, this Court not only second guessed the district court judge and misunderstood certain evidence, but its opinion distorts the well

established construction of the Commerce Clause.

The Court's misinterpretation begins with its erroneous assumption that the financing agreements which AP&L signed govern the transmission of Grand Gulf power into Louisiana, Mississippi, and Arkansas.

A look at the documents in the record will show that they do not control the allocation or transmission of Grand Gulf electricity. In fact, none of the documents were ever filed with the FERC, the federal agency responsible for the regulation of the wholesale sale and transmission of power in interstate commerce. 16 U.S.C. § 824(a). The documents which the APSC sought to review included (1) the Availability Agreement of June 21, 1984, wherein AP&L and the other operating companies in effect

agreed to reimburse MSE for the cost of construction of the Grand Gulf Project to provide collateral for the financing of Grand Gulf; (2) the Second Amendment to Availability Agreement, wherein AP&L assumed the obligation to pay for a 17.1% share of Grand Gulf costs whether or not the project ever generated or sold any electricity; and (3) a series of assignments of the Availability Agreement whereby AP&L and the other operating companies consented to make payments in the form of unsecured "advances" to MSE or to pay funds directly to the lenders in the event MSE defaulted in its payments and the FERC or another regulatory authority prohibited the operating companies from making payments under the Availability

Agreement.[2]

It is not these complex financing agreements, but rather the Unit Power Sales Agreement ('UPSA) and the System Agreement, both of which were submitted for approval to the FERC, which control the sale and transmission of Grand Gulf power. The Arkansas Commission did not purport to review either the UPSA or the Systems Agreement.

The Court thus completely misreads the effect of the agreements which the APSC sought to review. Even if the APSC had found that the financing documents should have been declared void, AP&L's obligation under the UPSA (as amended by the FERC) to purchase 36% of MSE's share

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[2]The Court incorrectly states that the lenders agreed to make unsecured advances to MSE in the event a regulatory agency prohibited the operating companies from making payments. Opinion, at 4, fn. 7.

of the capacity of the Grand Gulf project would not have been diminished. Nothing the APSC could have done in the show-cause proceeding would interfere with the FERC-ordered allocation of power between Arkansas, Mississippi, and Louisiana.

The APSC did argue before the FERC that Arkansas did not need Grand Gulf capacity, and the APSC was concerned with the economic impact on Arkansas of Grand Gulf. AP&L also was concerned and tried to persuade the FERC to allocate all the Grand Gulf capacity to Mississippi and Louisiana because Arkansas did not need Grand Gulf, as AP&L's counsel admitted in oral argument to this Court.

The stand taken by the APSC and AP&L in the FERC proceedings, however, does not constitute discrimination against the other states, and their positions before

the FERC on allocation have nothing to do with this appeal. Significantly, no party from Mississippi or Louisiana attempted to intervene at any stage of the case. Aside from several Arkansas intervenors, the only other party involved in this appeal was a group of MSE bondholders who did not argue that the APSC discriminated against out-of-state investors or interfered with interstate commerce.

The show-cause proceeding undertaken by the APSC was directed solely at AP&L, an Arkansas utility. Regulatory agencies in Louisiana or Mississippi are entitled to regulate utilities within their jurisdiction as well. Mississippi, for example, granted the original certificates of need for the Grand Gulf project and currently has undertaken a proceeding to revoke the certificates of

Unit Two of the project.

The exercise of a state's regulatory authority over the securities of public utilities within its borders has been held not to discriminate against interstate commerce. In Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985), the Court addressed the impact of a state statute which restricted the acquisition of stocks and bonds of Maryland utilities. A Maryland utility, seventy percent of whose shares were owned by investors outside the state, proposed a share-for-share exchange of all its stock for shares in a newly formed holding company, a transaction which would be prohibited by the state statute. The Fourth Circuit Court of Appeals held inter alia that the Maryland statute was not designed to favor local commerce because it imposed

no unique burden on interstate commerce. The statute "regulates evenhandedly," and the minimal burden it imposed was outweighed "by the state's interest in protecting the consumers of the products of public utilities." 760 F.2d 1408, 1423, 1425.

Because of the Court's erroneous assumption that the APSC's proceeding interfered with the interstate transmission of power, the Court's construction of the Commerce Clause is far broader than the Supreme Court intended in New England Power Company v. New Hampshire, 455 U.S. 331 (1982). In that case, the New Hampshire commission issued an order, discriminatory on its face, which restricted the export of cheap hydroelectric power generated within the state. New England Power sued to enjoin the Commission's order. In

contrast to the case on appeal, the attorneys general from Massachusetts and Rhode Island intervened and argued that the New Hampshire order discriminated against and interfered with interstate commerce. The Supreme Court agreed and held that New Hampshire "sought to restrict the flow of privately owned and produced electricity in interstate commerce, in a manner inconsistent with the Commerce Clause." 455 U.S. 331, 344.

In reaching this conclusion, the Court relied on a series of Commerce Clause cases which struck down facially discriminatory state legislation which conferred upon state residents a preference to the state's natural resources and restricted the flow of products across state lines. The Court stated that "[T]hese cases stand for the basic principle that a 'state is without

power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the grounds that they are required to satisfy local demands or because they are needed by the people of the State.'" 455 U.S. 331, 338, quoting Philadelphia v. New Jersey, 437 U.S. 619, 627.

This Court's decision throws this line of Commerce Clause cases into confusion. The APSC show-cause proceeding did not restrict the flow of any product crossing any state line, but rather was directed at AP&L's financial commitments. No "articles of trade" being shipped or sold in interstate commerce were involved, only the financial obligations of an Arkansas utility.

The record of the APSC's show-cause proceeding does not evidence

discrimination against out-of-state products. Nothing in New England Power or established Commerce Clause analysis prohibits this lawful exercise of State authority.

B. Any Impact of the Show-Cause Proceeding on Interstate Commerce is Incidental Only.

As the Court recognized, the regulation of utilities is one of the most important functions of the police power of the states. Ark. Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983).

Specifically, a state has a "very substantial interest in the issuance of securities under its laws by a company organized and operating" within that state. Indiana Michigan Power Co. v. State of Michigan, 275 N.W.2d 400 (1979). Arkansas thus has a legitimate

local interest in seeing that its utility regulatory laws are enforced and in protecting the financial integrity of the utilities within its borders.

This Court has recognized the states' interest in regulation of local public utilities in South Dakota Public Utilities v. F.E.R.C., 690 F.2d 674 (8th Cir. 1982). There the Wisconsin Public Service Commission denied a permit to construct a nuclear generating plant which had been permitted by an order of the Nuclear Regulatory Commission. Representatives of South Dakota and Minnesota argued that Wisconsin's actions burdened interstate commerce and cited New England Power. This Court, noting that the Wisconsin Commission's denial turned on lack of need for the nuclear plant, economic disbenefits, and superiority of alternate means of

generation, found that the "circumstances in the New England Power case to be so substantially different that it is inapplicable," and flatly rejected the Commerce Clause argument. 690 F.2d 674, 678.

Similarly, the APSC review of the financing documents in question focused on AP&L's participation in the financing of the Grand Gulf Project, a matter relevant to the utility's financial well-being. As in the case of Wisconsin's denial of a construction permit, this is a matter of local concern only.

Since the APSC had not even begun its hearings, no direct impact of the show-cause proceeding had occurred on interstate commerce or anywhere else. The impact of APSC's exercise of jurisdiction over the documents

evidencing AP&L's financing obligation would be at most incidental. Evidence at trial was that the markets were uncertain and that there was unrest among investors about MSU stock. Such incidental effects are not the type of discrimination forbidden by the Commerce Clause. Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985).

Evenhanded state regulation of a legitimate local public interest is upheld if its effects on interstate commerce are incidental, unless the burden imposed on interstate commerce is excessive in relation to the local benefits. Pike v. Bruce Church, 397 U.S. 137 (1970).

The Supreme Court recently found that a State's interest in regulating its utilities outweighed any burden on interstate commerce. In Arkansas

Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), the APSC asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation ("AECC") to its member retail distributors located in the state. Although the AECC purchased most of its energy from power plants located within the state, its facilities were tied to an interstate grid. After finding that federal law did not preempt state regulation of power cooperatives, the Supreme Court held that regulation of AECC's wholesale rates by the State of Arkansas did not impose an impermissible burden on interstate commerce. Because state regulation was within the scope of legitimate local interests and had only an incidental effect on the price structure of the interstate grid, the

APSC's assertion of jurisdiction "offends neither the Supremacy Clause nor the Commerce Clause." 461 U.S. 375.

Similarly, Arkansas' interest in regulating the securities of a utility within its border outweighs any incidental impact on creditors in other states. If the Court's opinion is allowed to stand, utilities in Arkansas and other states as well will be invited to avoid state regulation of their securities. Any public offering by and most financial arrangements of a major utility will involve some impact outside the state because of the national markets where investors from around the country deal. This Court's Commerce Clause analysis will leave the states powerless to scrutinize or regulate any of these arrangements.

The financial stability of AP&L is

essential if the public is to be served with electric service at a just and reasonable rate. Arkansas sought to achieve this end by securing AP&L's compliance with state law governing its securities and evidences of indebteness, and the state's interest in pursuing this lawful exercise of the authority by the APSC outweighs any incidental burdens on interstate commerce that may result.

CERTIFICATE OF SERVICE

I, Carol S. Arnold, do hereby certify that I mailed a copy of the above and foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to:

Mr. Michael Thompson
2000 First Commercial Building
Little Rock, Arkansas 72201

Mr. Jerry D. Jackson
1000 Savers Federal Building
Little Rock, Arkansas 72201

Mr. Steve L. Riggs
P. O. Box 551, Little Rock
Arkansas 72203

Mr. Robert Wood
Attorney General's Office
Justice Building
Little Rock, Arkansas 72201

Mr. Jay T. Youngdahl
2101 Main Street
P. O. Box 6030
Little Rock, Arkansas 72216

Mr. Louis H. Willenken
Lewis, Willenken, Reid & Priest
40 West 57th Street
New York, New York 10010

Mr. N. M. Morton, Jr.
Wright, Lindsey & Jennings
2200 Worthen Bank Building
Little Rock, Arkansas 72201

on this 5th day of September, 1985.

/s/
Carol S. Arnold

APSC EX. B

ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF ARKANSAS POWER & LIGHT COMPANY FOR APPROVAL OF CHANGES IN RATES APPLICABLE TO RESIDENTIAL, GENERAL SERVICE, INDUSTRIAL, AND OTHER RETAIL ELECTRIC SERVICE	)	DOCKET NO. 84-249-U
IN THE MATTER OF THE APPLICATION OF REYNOLDS METALS COMPANY FOR INTERPRETATION OF AGREEMENT FOR ELECTRIC SERVICE	)	DOCKET NO. 85-198-U

STIPULATION AND
SETTLEMENT AGREEMENT

The Arkansas Public Service Commission Staff ("Staff"), Arkansas Electric Energy Consumers ("AEEC"), Southern Cotton Ginners Association ("SCGA"), Attorney General Steve Clerk ("AG"), Reynolds Metals Company ("Reynolds") and Arkansas Power & Light

Company ("AP&L" or "the Company") (hereinafter collectively referred to as "Parties") consent and agree to the following terms in settlement of all issues pending before the Arkansas Public Service Commission ("Commission" or "APSC") in the aforementioned dockets and in the additional proceedings specified herein:

1. AP&L will be permitted to implement effective for bills rendered on and after September 9, 1985, a new Rate Schedule Rider ("Rate Schedule Rider M33" or "Rider M33"), in the form attached hereto as Exhibit 1, to recover costs associated with the Grand Gulf nuclear plant ("Grand Gulf"), a ninety percent share of which is owned by Middle South Energy, Inc. ("MSE"). Under the provisions of Rate Schedule Rider M33, all costs associated with

Grand Gulf Unit 1 incurred by AP&L will be retained, deferred or recovered by AP&L as follows:

a. Effective on September 1, 1985, AP&L will permanently retain the Arkansas retail allocation of the proportions of the costs associated with its allocated share of the power available to MSE from Grand Gulf Unit 1, as shown in Table I set forth below which proportions are stated in terms of percentages of MSE's share of Grand Gulf Unit 1 ("Retained Share"). The Arkansas retail portion of such costs associated with the Retained Share will not be recovered from AP&L's Arkansas retail customers under Rate Schedule Rider M33.

TABLE I

Year	Retained Share*
1	4.32%
2	4.77%

3	5.22%
4	5.67%
5	6.12%
6	6.57%
7	7.02%
8	7.47%
9	7.92%
10 and all succeeding years	7.92%

*Retained Share shown is expressed on a total company basis

The proportionate reductions in revenues from AP&L's Arkansas retail customers under this subparagraph will be permanent and will never be recovered from AP&L's Arkansas retail customers except as provided in paragraph 3 of this Agreement. Provided, however, should MSE subsequently execute a settlement agreement which results in a permanent reduction in the charges to AP&L from that which MSE would otherwise be entitled to collect in accordance with FERC Opinion No. 234 dated June 13, 1985, such permanent reduction will first be applied to reduce on a dollar-

for-dollar basis the Retained Share as set forth in this paragraph. In the event such permanent reduction in charges by MSE exceeds the Retained Share provided in this paragraph, the Current Recovery Share described in subparagraph (1)(c) of this Agreement will be reduced to the extent of such excess.

b. Effective on September 9, 1985, and terminating on August 31, 1995, AP&L will defer or inventory the Arkansas retail allocation of the proportions of the costs associated with its allocated share of the power available to MSE from Grand Gulf Unit 1, as shown in Table II set forth below which proportions are stated in terms of percentages of MSE's share of Grand Gulf Unit 1 ("Inventory Share"). The costs deferred and accrued in the Inventory

Share will not be recovered from AP&L's Arkansas retail customers during the aforesaid ten-year period except as provided in paragraph 2 and paragraph 3 of this Agreement.

TABLE II

Year	Inventory Share*
1	14.88%
2	14.23%
3	13.78%
4	10.53%
5	7.88%
6	6.63%
7	5.18%
8	4.72%
9	4.28%
10	4.08%

*Inventory Share shown is expressed on a total company basis

Provided, however, should MSE subsequently execute a settlement agreement containing an inventory or deferral plan which results in a reduction of the charges to AP&L from that which MSE would otherwise be

entitled to collect in accordance with FERC Opinion No. 234 dated June 13, 1985, such reduction due to an inventory or deferral plan by MSE will first be applied on a dollar-for-dollar basis to reduce the Inventory Share as set forth in this paragraph. In the event such reduction in charges to AP&L resulting from a MSE inventory or deferral plan exceeds the Inventory Share provided in this subparagraph, the Current Recovery Share will be reduced to the extent of such excess. It is further agreed that AP&L shall be permitted to recover on a current basis the incremental cost of financing the deferral of the Inventory Share shown in Table II above, as provided in the attached Rider M33. The cost of financing incurred to finance the Inventory Share and the phase-in of a portion of the Current Recovery Share

which is recovered under Rider M33 will not be utilized to calculate the Company's revenue requirements recovered through the Company's other rate schedules. Beginning in year eleven (11), the Company shall be allowed to include the balance of costs accumulated in the Inventory Share (which are accumulated during the period September 1, 1985 through August 31, 1995, and until such time as these costs are reflected in Arkansas retail rates on a current recovery basis) in its rate base for determining its Arkansas retail revenue requirements. In addition, the Company shall amortize on a level basis and recover through its retail rates such accumulated costs over the remaining depreciable life of Grand Gulf Unit 1 or such shorter period of time as the Commission may subsequently determine to be appropriate.

c. Commencing with all bills rendered on and after September 9, 1985, AP&L will be permitted to recover the Arkansas retail portion of all costs associated with the proportions of its allocated share of the power available to MSE from Grand Gulf Unit 1 on a current basis in accordance with the terms and provisions of Rider M33, as shown in Table III set forth below which proportions are stated in terms of percentages of MSE's share of Grand Gulf Unit 1 ("Current Recovery Share"):

TABLE III

Year	Current Recovery Share*
1	16.80%
2	17.00%
3	17.00%
4	19.80%
5	22.00%
6	22.80%
7	23.80%
8	23.80%
9	23.80%
10	24.00%

11 and all succeeding years	28.08%

*Current Recovery Share shown is expressed on a total company basis

A portion of Grand Gulf Unit 1 costs to be recovered from AP&L customers pursuant to this subparagraph (c) will be phased in over a ten-year period in accordance with the phase-in methodology set forth in the attached Rider M33.

d. In the event any customer of AP&L ceases to be a customer of AP&L or reduces consumption or demand before the Company has fully recovered the costs accumulated and deferred in either the Inventory Share or the phase-in plan with respect to the Current Recovery Share as described in subparagraph (c) of this paragraph 1, the parties agree that: (a) no attempt will be made to impose any charge or penalty on such customer as a result of the customer's

withdrawal from the system before completion of the recovery of such costs and (b) all deferred amounts will be recovered from all Arkansas retail customers then and thereafter receiving service on the AP&L system.

e. The parties stipulate and agree that the Arkansas retail portion of the costs associated with Grand Gulf Unit 1 will be determined using the production demand related allocation methodology approved or utilized by the Commission in establishing Arkansas retail rates. Beginning September 9, 1985, this production demand related allocation factor to be used will be 88.59 percent which is the production demand related allocation factor for interim use under this Agreement pending final order in the docket established pursuant to paragraph 6 of this

Agreement. The parties further agree that the allocation factor established in that docket may be redetermined by the Commission in any subsequent rate proceedings involving AP&L. Any such subsequent change in this allocation factor would be incorporated in the next update of costs recovered in Rider M33 as provided under the terms of Rider M33 and will be utilized prospectively. It is understood that this production demand allocation factor was derived using a cost allocation methodology which is disputed by some of the parties and the agreement by any party to the use of this factor on an interim basis shall not be deemed as acceptance of this factor or the methodology by which it was derived for other purposes.

2. The parties recognize and agree that the Company's agreement to defer

the recovery of a portion of the costs incurred for Grand Gulf Unit 1 (the Inventory Share), as provided in subparagraph 1(b) of this Agreement, or to phase in the recovery of any portion of the Current Recovery Share as provided in subparagraph (1)(c) of this Agreement (hereinafter collectively referred to as Deferred Grand Gulf costs) is contingent upon the conditions set forth in subparagraph 2(a) and 2(b) as set forth below:

a. The Company's agreement to defer or phase-in a portion of the Grand Gulf costs as provided in this Agreement is conditioned upon the Company's ability to finance such deferral on reasonable terms and the Company agrees that it will use its best efforts to secure such financing.

i) The parties agree that in the event the Company is not able to finance all or any portion of the Deferred Grand Gulf costs on reasonable terms because of (1) inadequate interest coverage ratios or other restrictions contained in the Company's mortgage or charter, (2) policies, rules or regulations of the Securities and Exchange Commission, Internal Revenue Service, or any other state or federal agency which is aplicable to the Company, (3) restrictions or requirements contained in any legislative enactments after the date of this Agreement, (4) changes in accounting standards, policies or procedures adopted by the Financial Accounting Standards Board (FASB) or the FERC, or changes in the application of existing standards, policies by the FASB or FERC, (5) other restrictions upon the

Company's ability to finance because of inadequate revenues or earnings, then in such event: (a) the Inventory Share will be reduced, after thirty (30) days notice to the Commission and the office of the Attorney General, to the extent of the Company's inability to finance the deferral of such costs on reasonable terms during the period of such inability to finance, and the percentage or amount of the costs to be recovered currently from customers (Current Recovery Share) as set forth in subparagraph (1)(c) of this Agreement will be increased to the extent necessary to recover, on a current basis, the costs which would otherwise have been allocated to the Inventory Share but for the Company's inability to finance, and (b) the proportion of the

costs in the Current Recovery Share which would be deferred under the phase-in plan as set forth in Rider M33 will be reduced to the extent of the Company's inability to finance the deferral of such costs on reasonable terms and the Company will be permitted to amend Rider M33 to recover such costs from its Arkansas retail customers on a current basis.

ii) If, during the thirty (30) day notice period set forth in paragraph 2(a)(i) above, any party shall disagree with the Company's contention that it is unable to finance all or any portion of such deferral on reasonable terms, any such party shall have the right to file a petition with the Commission seeking a determination as to whether the Company is unable to finance such deferrals on reasonable terms because of any of the

reasons set forth in subparagraph (a)(i) of this paragraph. The Company agrees that it shall have the burden of proof to establish the existence of such inability to finance in any such proceeding before the Commission. Any party to the proceeding before the Commission who is aggrieved by the Commission's order determining whether an inability to finance in any such proceeding before the Commission. Any party to the proceeding before the Commission who is aggrieved by the Commission's order determining whether an inability to finance exists shall have the right to seek rehearing and judicial review in accordance with Act 231 of 1973 as amended, (Ark Stat. Ann. Section 73-229.1).

b. The Company's agreement to defer or phase-in a portion of the Grand

Gulf costs as provided in this Agreement is also conditioned upon the Company's ability to record on its books, on a current basis, the deferral of any Grand Gulf costs under applicable accounting standards adopted or required by the FASB or the FERC. In the event the Company is not able to record on its books, on a current basis, the deferral of any Grand Gulf costs because of changes in accounting standards, policies or procedures by the FASB or FERC, or changes in the application of existing standards, policies or procedures by the FASB or FERC, the parties agree to use their best efforts to negotiate a mutually acceptable amendment to this Agreement which will modify the Agreement to reflect such changes in accounting standards adopted or required by the FASB or the FERC.

Unless an amendment to this Agreement which is mutually acceptable to the parties is achieved and approved by the Commission, after public notice and hearing, within ninety (90) days after such change occurs, this Agreement will terminate except that all costs associated with Grand Gulf Unit 1 which have been defered by AP&L prior to the termination of this Agreement will be recovered in accordance with the provisions of this Agreement. The parties agree that if either AEEC or SCGA, or any successor association, is no longer in existence at the time any such negotiations are commenced, it will be sufficient compliance with the provisions of this paragraph if their attorneys of record in this proceeding, or their successors, are given appropriate notice of, and an

opportunity to participate in, any such negotiations.

3. The parties agree that:

a. AP&L shall have the right to sell the capacity and energy available from its Retained Share to third parties, (as used in this Agreement, Third Parties shall not include AP&L's wholesale customers) without any restrictions or other requirements, and the acceptance of this Settlement Agreement by the Commission shall constitute approval of any such sales made or to be made by AP&L from its Retained Share during the time that Grand Gulf Unit 1 is in commercial service. In the event AP&L is not able to sell the capacity and energy available from its Retained Share to third parties, it shall have the right to sell the energy available from such

capacity to AP&L retail customers at a price equal to AP&L's avoided energy cost.

b. AP&L's avoided energy cost will be equal to the avoided energy cost as filed with the Commission pursuant to AP&L's Cogeneration Service Rider M23 or any superseding rate schedule.

c. All proceeds from such sales of capacity or energy from AP&L customers shall accrue to the sole benefit of the Company's stockholders and shall not be used to reduce the determination of the appropriate revenue requirement to be recovered from the Company's customer.

d. AP&L agrees that any sale of capacity and energy from AP&L's allocation of MSE's share of Grand Gulf Unit 1 to third parties during the ten-year period between September, 1985

and August 31, 1995, will be allocated between the Retained Share and the Inventory Share in the following manner:

i) fifty (50) percent of the capacity and/or energy sold (not to exceed the amount of capacity allocated to the Retained Share) wil be considered to be a sale of capacity and/or energy from the Retained Share and the proceeds of such sale would accrue to the sole benefit of the Company's stockholder and shall not be used to reduce the determination of the appropriate revenue requirements to be recovered from the Company's customers.

ii) the remainder of the capacity and/or energy sold will be considered to be a sale from the Inventory Share and the proceeds of such sale shall be applied to reduce the costs allocated to the Inventory Share

for the year in which such sale is made in accordance with paragraph 4 of this Agreement. Provided, however, the Commission shall have the option to determine that such sale will not be made from the Inventory Share in which event the sale will be considered to be a sale solely from the Retained Share (to the extent of the capacity allocated to the Retained Share) and the proceeds applied as set forth in subparagraph 3(d)(i) above.

4. Any energy available to AP&L from the Inventory Share shall be sold to AP&L Arkansas retail customers at AP&L's avoided energy cost as defined in subparagraph 3(b) of this agreement or any such energy may be sold to third parties if such energy can be sold for more than AP&L's avoided energy cost. All revenues resulting from the sale of

energy from the Inventory Share to AP&L customers or to third parties in excess of the variable costs of producing that energy shall be applied to reduce the Inventory Share. Variable costs shall not include depreciation expense calculated on a units-of-production or similar method.

5. In settlement of all other issues in APSC Docket No. 84-249-U, the parties agree as follows:

a. In addition to the implementation of Rider M33 in accordance with this Agreement, AP&L shall be permitted to increase its Arkansas retail rates, effective September 9, 1985, by $52 million on a total company basis and to implement new rate schedules applicable to its Arkansas retail customers designed to produce an Arkansas retail revenue requirement, ex Reynolds, of

$787,857,000 as set forth on the attached Exhibit 2.

b. The presently approved fuel adjustment clause (FAC) now on file as Rate Schedule Rider M-27 shall remain in full force and effect until changed by order of the Commission, after hearing, in a general rate proceeding of AP&L. Provided, however, that for purposes of administration and calculation of the FAC the appropriate base cost of fuel and purchased power expense included in the Company's base rates (the "B Factor") shall be 15.232 mills/kwh. Provided, however, in the event Waterford 3 is placed in commercial operation prior to March 1, 1986, the "B" Factor would revert to 15.232 mills/kwh.

c. The parties agree that the appropriate rate of return on equity for

the Company is 14.9% and this return on equity should be approved by the Commission for AP&L in this proceeding. It is recognized and agreed that the appropriate rate of return on equity for AP&L may be redetermined by the Commission in subsequent retail rate proceedings involving AP&L.

d. The parties recognize and agree that the stipulated Arkansas retail revenue requirement set forth in subparagraph 5(a) above reflects an excess capacity adjustment which denies the Company a current return on 969 megawatts of generating capacity, reflecting an investment of $215,107,000 allocated to the Arkansas retail customers. The parties agree that the Company should be allowed to earn a full deferred return on the investment in such capacity, which return will be

capitalized and recorded on the Company's books in a manner similar to an allowance for funds used during construction (AFUDC) using a capitalization rate of 14.344 percent which will result in a monthly deferral of $2,571,000. This capitalized return will be accrued and deferred on the Company's books until the Commission issues an order in the Company's next application for a general retail rate increase or until July 1, 1987, whichever first occurs, at which time the Company will be permitted to recover the amount capitalized and deferred, amortized on a level basis over a ten (1) year period, commencing on the date new rates are implemented in accordance with the Commission's order in the Company's next application for a general

retail rate increase or on July 1, 1987, whichever first occurs.

e. The parties recognize that the Agreement for sale of White Bluff capacity by AP&L to Louisiana Power & Light Company (LP&L) and New Orleans Public Service Inc. (NOPSI) dated October 28, 1982 (Unit Power Purchase Agreement), will terminate upon the commercial operation of LP&L's Waterford 3 nuclear unit. Inasmuch as AP&L should be allowed to place into effect a new Rate Schedule Rider M32 (Rider M32), in the form attached hereto as Exhibit 3. Commencing on the date Waterford 3 is placed in commercial operation, or March 1, 1986, whichever is later, AP&L would be permitted to recover additional revenues from its Arkansas retail customers, under the provisions of Rider M32, until such time as new base rate

schedules are approved by the Commission which permit AP&L to recover revenues adequate to offset the revenue loss to AP&L resulting from the termination of the UPSA.

6. The amount of any revenue increases provided for in this Settlement Agreement shall be apportioned among all classes of customers in a manner designed to produce a proportionate revenue increase for all customer classes in substantial accordance with the rate structure approved by the Commission in Docket No. 84-199-U. The parties agree that this Settlement Agreement does not resolve on a permanent basis any issues with respect to cost allocation or rate design in Docket 84-249-U and that the proceedings for the Commission's consideration of such issues shall be

transferred to a new Docket to be established by the Commission for resolution of such issues. The parties agree that any issues raised by any party to the proceedings in such new Docket with respect to cost allocation or rate design should be resolved by a final order of the Commission issued on or before March 31, 1986. Any order of the Commission in such new docket which orders a different allocation or rate design from that reflected in the rates approved in accordance with this Settlement Agreement shall be applied prospectively only.

7. All of the aforementioned parties except AP&L agree to take such action as may be necessary to voluntarily dismiss without prejudice, terminate or withdraw their interventions in the following

litigation concerning AP&L to the extent they have the ability to do so.

a. MSE vs. APSC
U.S. Court of Appeals for the Eighth Circuit, Nos. 84-2409, 84-2410, 84-2480 and 84-2356

b. APSC Docket No. 83-206-U

c. APSC Docket No. 84-040-0II

d. APSC Docket No. 84-041-0II

e. APSC Docket No. 84-190-U

f. APSC Docket No. 84-199-U

g. APSC Docket No. 85-003

h. APSC Docket No. 85-137-A

i. SEC Dockets 70-6892, 70-6906, 70-7021 and 70-7026

j. APSC v. SEC
U.S. Court of Appeals for the D.C. Circuit, No. 85-1138

AP&L agrees to take such action as may be necessary to voluntarily dismiss without prejudice, or terminate the following litigation concerning the APSC or other parties:

a. AP&L vs. APSC
U.S. District Court No. LR-C-85-571

b. Bemis et al. vs. APSC
Pulaski County Circuit Court No. 85-5130

c. AP&L vs. APSC
Arkansas Court of Appeals No. CA-85-210

AP&L also agrees to withdraw its pending Freedom of Information Act request that is the subject of item (b) listed immediately above. Each of the parties agrees that it will not refile or reinstitute suc litigation or other litigation raising similar issues on any of the same facts so long as this Agreement remains in effect. The parties agree that this Settlement Agreement is expressly contingent upon the Commission making the necessary findings in its order approving this Settlement Agreement that it will (a) voluntarily dismiss without prejudice, terminate, or withdraw

its intervention in the litigation listed above in which the Commission is a party or participant and that it will not refile or reinstitute such litigation as long as this Agreement remains in effect, and (b) take such action as may be necessary to close the Commission Dockets listed above. The continued effectiveness of this Settlement Agreement is also expressly contingent upon the Commission taking such action as may be necessary to terminate or dismiss such proceedings. It is further agreed that the parties to this agreement who are also parties to the FERC litigation in FERC Dockets ER82-483-000 and ER82-616-000 will continue to vigorously pursue petitions for rehearing or judicial review of the FERC's decision in said dockets. Any reduction or increase in AP&L's allocated share of Grand Gulf

Unit 1 from that determined by the FERC in Opinion No. 234 which results from any rehearing or judicial review of Opinion No. 234 will be applied so as to proportionately reduce or increase the allocation of cost for Grand Gulf Unit 1 which is (1) retained by AP&L (Retained Share), (2) inventoried by AP&L (Inventory Share), and (3) currently recovered from AP&L customers (Current Recovery Share). Any such modification of the allocations shall be prospective unless cash refunds are required to be paid by MSE to AP&L by order of the FERC or a reviewing court. In the event such modification results in a cash refund to AP&L of payments made to MSE, the cash refund will be applied to achieve proportionate reductions in the costs allocated to the Retained Share, the Inventory Share and the Current Recovery Share.

8. The parties agree that the application filed by AP&L in APSC Docket 85-159-U will be approved as filed without any qualification or restriction beyond the customary or standard conditions applicable to orders obtained by AP&L in previous financing applications.

9. The program designed to mitigate the impact of Grand Gulf costs on low and moderate income customers, as proposed by AP&L in its Motion filed in this docket on June 26, 1985, in connection with an earlier settlement proposal, will be adopted. It is recognized by the parties that AP&L is able to offer this program because of the reduction in revenues of Grand Gulf Unit 1 costs as provided in subparagraph (1)(a) of this Agreement and it is agreed that this program will not result in an

additional reduction in revenues to AP&L beyond that resulting from AP&L's agreement to absorb that portion of the costs associated with Grand Gulf Unit 1 allocated to the Retained Share as provided in subparagraph (1)(a) of this Agreement.

10. The parties agree that no additional rate increases or rate reductions for AP&L's Arkansas retail customers will become effective prior to the earlier of the following dates: (1) that date which is seventeen (17) months after the termination of the Unit Power Purchase Agreement between AP&L, LP&L and NOPSI dated October 28, 1982, with respect to the short-term sale of White Bluff capacity or (2) July 1, 1987, whichever first occurs, but in any event no earlier than April 1, 1987, except for: (a) rate changes resulting from a

determination by the Commission that such change in rates is justified because of the existence of an immediate and impelling necessity (excluding any consideration of the costs associated with Grand Gulf Unit 1 or any current or deferred recovery of such costs under Rider M33) pursuant to subsection (b) of Section 18 of Act 324 of 1935, as amended [Ark. Stat. Ann. Section 73-217(b)], (b) rate changes provided for under the terms of this Agreement, (c) rate changes obtained through applications under Act 310 of 1981, as amended, (d) rate changes to reflect revised estimates of decommissioning expense currently recovered under Rate Schedule Rider M29, (e) rate changes applicable solely to Reynolds under the Agreement for Electric Service between AP&L and Reynolds, or (f) rate changes under any other special

contract applicable to any Arkansas retail customer, including but not limited to, any incentive rate contract between the Company and any Arkansas retail customer. Provided, however, each of the parties except AP&L reserves the right to file a petition with the Commission seeking a reduction in AP&L's Arkansas retail rates if the Company's return on year-end equity exceeds 16.0% on its Arkansas retail business (excluding any consideration of the costs associated with Grand Gulf Unit 1 or any current or deferred recovery of such costs under Rider M33) utilizing a forward-looking test period, as adjusted, as defined in Ark. Stat. Ann. Section 73-217.5, and also adjusted to remove the effects of any non-recurring conditions occurring during the test period. For purposes of this paragraph it is agreed

that: (a) increases or decreases in revenues to the Company through the operation of the Company's fuel adjustment clause (Rate Schedule Rider M-27), (b) surcharge recoveries resulting from the appeal of the Commission's order in Docket No. 81-144-U, or (c) changes in individual rate schedules or the filing of new tariffs not involving a general rate increase would not be considered a rate increase or rate reduction.

11. Should any operating company subsidiary of Middle South Utilities, Inc. enter into a settlement agreement which is approved (or allowed to become effective) by the appropriate regulatory authority where such approval would be required in order for the Agreement to become effective, wherein the other operating company agrees to absorb a reduction in the stockholder's

recovery of costs associated with Grand Gulf Unit 1 which is proportionately greater than the reduction provided in this Settlement Agreement, the reduction in the recovery of costs associated with Grand Gulf Unit 1 provided in this Agreement will be increased so as to result in a reduction in the costs recovered by the stockholder which is proportionate to that agreed to by the other operating company.

12. AP&L's present share of Grand Gulf Unit 1 and the percentage allocations contained in paragraph 1 will not be changed due to the bankruptcy or insolvency of another operating company subsidiary of Middle South Utilities, Inc.

13. This Settlement Agreement is made upon the explicit understanding that it constitutes a negotiated settlement in the public interest.

Nothing herein shall constitute an admission of any claim, defense, rule or interpretation of law, allegation of fact, principle or method of ratemaking or cost of service determination or design of rate schedule, or terms or conditions of service, or the application of any rule or interpretation of law, that may underlie, or be perceived to underlie, this Settlement Agreement.

14. This Settlement Agreement is expressly contingent upon its approval by the APSC without modification. The various provisions of the Settlement Agreement are not severable except that the invalidity or unenforceability of paragraph 12 of this Agreement shall not affect the remaining provisions hereof. All parties will cooperate fully in seeking acceptance and approval by the APSC of the Settlement Agreement and will

support its approval in all respects without modification in any further proceedings which may be ordered, or appeals taken, with regard to this Settlement Agreement.

15. The terms of this Settlement Agreement shall be offered to all other AP&L customers and to the Public Service Commission of Missouri, as soon as practicable following the approval of this Agreement by the Commission.

16. In the event the Commission does not accept, adopt and approve this Settlement Agreement in its entirety and without modification on or before September 9, 1985, or in the event the rate schedules agreed to herein do not become effective for service rendered in accordance with the provisions contained herein on or before September 9, 1985:

(a) this Settlement Agreement shall be void and of no effect and no party shall be bound by any of the provisions or agreements herein contained; (b) all parties shall in that event be deemed to have reserved all their respective rights and remedies in these proceedings; and (c) this Settlement Agreement shall not be a part of the record in any proceedings, and all discussions and negotiations with respect to the Settlement Agreement shall be privileged and confidential.

17. The parties recognize and agree that the Statement of Financial Accounting Standards No. 71 (FASB No. 71) requires that any deferred amounts related to deferred returns or deferred cost recovery must be assured of recovery without possibility of review in the future or the deferral will not be

recordable for financial accounting purposes. The parties further agree that this Settlement Agreement is conditioned upon the Commission's including in its order approving this Settlement Agreement such provisions as may be necessary in order to assure future collection of all amounts representing a deferred return or deferred recovery of Grand Gulf costs as provided under the terms of this Settlement Agreement and Rider M33. Further, such order should approve the necessary accounting entries (as reflected in Exhibit 4) to accomplish such deferrals on the Company's books.

18. This Agreement may be amended, supplemented or modified only by a written amendment executed by AP&L, the Staff, Reynolds, and the AG and approved by the Commission after public notice and hearing. If, subsequent to the approval

of this Agreement by the Commission, (a) any provisions of this Agreement are subsequently altered or modified by the Commission or (b) the Commission establishes new rates for AP&L which are inconsistent with the provisions of this Agreement, without the mutual consent or agreement of AP&L, the Staff, the AG, and Reynolds, this Agreement shall terminate. It is the intent of the parties that if the Agreement is terminated under the provisions of this paragraph, all rights and remedies, both legal and equitable, that existed prior to this Agreement, shall be restored to all of the parties to this Agreement in the event it is terminated under the provisions of the paragraph including AP&L's right to claim that it should be allowed to recover any costs which have been allocated to the Retained Share and

not recovered by AP&L in reliance upon the other provisions of this Agreement.

19. As to the allocation and recovery of Grand Gulf costs, AP&L and Reynolds acknowledge and agree that the Agreement For Electric Service between them approved by the Commission in Docket No. 82-314-U shall be interpreted and administered in a manner consistent with the terms of this Agreement. Should any inconsistency or conflict arise between the terms of the Agreement For Electric Service and the terms of this Agreement, AP&L and Reynolds acknowledge and agree that the terms of this Agreement shall control, it being the intention of this paragraph to effect equivalent treatment of Grand Gulf cost recovery among Reynolds and other ratepayers in all respects. In consideration herefor, Reynolds agrees that, upon approval of

this Agreement by the Commission it shall promptly take such steps as are necessary to accomplish the dismissal of its petition filed with the Commission in Docket No. 85-198-U and agrees that it will not refile or reinstitute such litigation so long as this Agreement remains in effect.

DATED this 5th day of September, 1985.

ARKANSAS PUBLIC SERVICE COMMISSION STAFF

By: /s/

/s/
Steve Clark
Attorney General of Arkansas

ARKANSAS ELECTRIC ENERGY CUSTOMERS

By: /s/

SOUTHERN COTTON GINNERS ASSOCIATION

By: /s/

REYNOLDS METALS COMPANY

By: /s/

ARKANSAS POWER & LIGHT COMPANY

By: /s/

The Arkansas Public Service Commission does hereby accept and approve the terms of the above Settlement Agreement and agrees to enter an order consistent therewith this ___ day of September, 1985.

ARKANSAS PUBLIC SERVICE COMMISSION

/not signed/
Chairman

/not signed/
Commissioner

/not signed/
Commissioner

ATTEST:

/not signed/
Secretary

court found that Arkansas "seeks to close its borders to high-cost electricity" and that the Commission's examination of these financial transactions had the objective of preventing Arkansas ratepayers from bearing any costs for Grand Gulf Unit 1. If concluded that "[p]rivate [u]tility rein" this Commission would [illegible] "economic protectionism" of Arkansas ratepayers by shifting Grand Gulf I costs to ratepayers in Louisiana and Mississippi and, therefore, the Commission's activity was violative of the Commerce Clause of the United States Constitution. The Eighth Circuit Panel concluded that this Commission "must be prohibited from voiding Ark.'s role in the Grand Gulf project."

The Commission does not agree with the findings of fact and conclusions of law by the Eighth Circuit Panel. The Commission was acting in furtherance of its authority applicable to review the securities issuances of utilities within its jurisdiction, as recognized by the federal utility regulatory scheme set forth in the Federal Power Act and the Public Utility Holding Company Act. However, it is appropriate to the Commission from this federal appellate court decision that any activity of the Commission which results in a significant reduction of costs for Grand Gulf 1 to Arkansas ratepayers is in direct dependent of being funded by the United States Court of Appeals for the Eighth Circuit as

"economic protectionism," and as an impermissible interference with interstate commerce.

AP&L filed suit in the United States District Court for the Eastern District of Arkansas on August 13, 1982, seeking to require the Commission unconditionally to pass through to Arkansas ratepayers all costs of Grand Gulf 1 allocated by the FERC to AP&L.

See Arkansas Power & Light Co. v. Arkansas Public Service Commission, No. LR-C-82-257. While the court has not acted upon the AP&L complaint, it did include the following language in a Memorandum Opinion of August 30, 1982:

> In order for rates to be confiscatory, it is not necessary that stockholders receive no return and that the utility default on its debts.

> If the rates ultimately and
> temporarily produce such a
> result, the rates are
> impermissibly confiscatory.
> The rates must provide AP&L
> with a fair return on its
> invested capital . . .
> consistent with the public
> interest.

The district court defined the primary issue before it to be "whether the APSC's actions 'interfere, with interstate commerce or consciously frustrate' FERC Opinion No. 534."

In the commission's opinion, the Eighth Circuit panel has clearly misdefined its conclusion that any action by the Commission which would result in the imposition of grand jury costs from Arkansas ratepayers to ratepayers of Louisiana and Mississippi would violate the Commerce Clause. In our opinion, under the current status of the federal law in the Eighth Circuit, the federal

counts in this circuit would in all probability prompit or invalidate a Commission decision which completely protects the interests of Arkansas ratepayers from grand cult costs. Although the Commission believes that interpretations of the courts in the Eighth Circuit do not constitute the appropriate legal standard, it must acknowledge them and must recognize the gendets inherent in the application of these standards to the actions of this Commission on the issues before it. Therefore, in order to assure some protection to Arkansas ratepayers, the Commission has little choice but to accept the stipulation as submitted.

Our analysis of the legal situation in which we authorized final ontological is undertaken and effected electronically by the former Chairman of this Commission, Mr. N. M. (Mac) Norton, Jr. In his closing statement, Mr. Norton appropriately summed up the situation we now face.

Incredibly, so to speak, I have this with a black and white Person, but I'd like to think we have a lawyer who would overturned by my emotions but is overturned by my judgment is not overturned by my head, and what as a lawyer I can contribute to your analysis, I think, is a look at the legislative situation.

Let me first say that it we were in any other legislative circuit and I would probably feel differently about this. However, first basic conflict of Appeals does not seem to be cabable of appreciating the unsafe, unsound, unconstitutional law that should govern a situation such as this one.

whatever the outcome in Judge Wheeler, court, I have no doubt that the losing side would appeal. It we were that losing side, I don't think the prospects for that particular appeal would be bright, and even it we were the winning side and had the advantage I would still discount out the chances given the sufficient that the Eighth Circuit has expressed on issues that arose among these parties and on similar issues arising in Minnesota and North Dakota.

In other words, what I am saying is that a petition for certiorari to the United States Supreme Court is in the offing it there is not a settlement, because that is the only approach that can finally resolve this matter.

That will be a load off everybody. And if we will quickly, we will all be in a state of uncertainty; the economy of the state will be in a condition of uncertainty -- let's face it, the politics of the state will be in a condition of uncertainty.

not yet ruled upon the motions for representing. Appeals of the orders denying a stay and rehearing have been lodged with the Circuit Court of Appeals for the District of Columbia.

In May of 1984, the first of four proposals to settle the Grand Gulf allocation issue was filed by AP&L and MP&L. The first proposal was rejected out of hand by the Louisiana parties and, indeed, was never filed formally with the FERC or any other regulatory body. None of the Arkansas parties other than AP&L embraced the proposal since it had no prospect of being accepted by the FERC over the objections of the Louisiana parties. Furthermore, this first settlement proposal made no provision for any

shareholder approval of Grand Gulf costs.

A second settlement proposal was made by all of the MSU operating companies (L&P, MP&L, AP&L and NOPSI) in January, 1982. This proposal for the first time included a limited, temporary shareholder contribution. The contribution was of dual nature. The certainty, since it appeared that the shareholders, responsibility might be reduced by designated sales to retail customers of inventoried energy and capacity. This proposal was formally filed with the FERC and theretofore was rejected by virtually all of the parties in the Cost stages, as well as by this Commission.

FERC Chief Administrative Law Judge, Curtis Wagner, ordered all parties to the two FERC cases to attend a settlement conference in March, 1982. The Commission affirmed the conference, presented a reasonable settlement proposal for consideration, was prepared to make further concessions, and at all times negotiated in good faith. After a two and one-half day conference conducted before Judges Wagner, Liebman, and Head, the parties were unable to reach an agreement. Judge Wagner terminated the conference and issued an order requiring the parties to continue settlement discussions on their own.

ABAL filed yet another settlement proposal (the June proposal) with the

Commission in Docket No. 84-SAS-U on June 15, which was offered on a "take it or leave it" basis and was conditioned upon acceptance without modification on later than July 15, 1981. This was the first time that a settlement proposal was not developed on approval by other parties. Although the June proposal was more attractive than previous proposals, it was not as acceptable as the proposal von petore us.

After six extensive days of hearings, extensive further settlement and subsequent, during which the proposal was opposed by staff and all intervenors in this docket, the Commission on July 15 rendered an order from the bench rejecting the settlement

proposal by a vote of 5 to 1, with Chairman Johnson dissenting and announcing that he would have accepted the settlement provided (in fact all) the rates were implemented on a retroactive basis until a final decision was rendered in this docket on September 9, 1982.

On August 1, 1984, in Docket No. 84-102-U, the Commission issued an Order to Show Cause to AP&L, instructing the company to appear and show cause why certain Grand Gulf related financial adjustments entered into by AP&L should not be declared to be void under Arkansas law which requires Commission approval of the issuance by any utility of stocks, bonds, or other evidences of

independence, as well as the burchase, lease, or acquisition of utility brant. Ark. Stat. Ann. §73-523--525 (Repl. 1979). MSE filed suit in Federal district court to bermanently enjoin the show cause broceedings. ABAL intervened in the Federal court on the side of MSE while the Attorney General and Ratebayers Right Back intervened on the side of the Commission. Federal Judge Henry Woods ruled that the Commission's actions were breempted by the Federal Power Act, and bermanently enjoined the Commission from conducting further broceedings on the show cause order. Middle South Energy, Inc. v. Arkansas Public Service Commission, No. LR-C-84-778, (E.D. Ark. Sept. 14, 1984). The Commission appealed this

decision to the United States Court of Appeals for the Eighth Circuit. On August 23, 1982, the Eighth Circuit issued its ruling, rejecting the reasoning of the District Court but affirming the result. Although the Court did not decide whether the Commission show cause investigation was preempted by the Federal Power Act, it determined that the investigation was precluded by the Commerce Clause of the United States Constitution. See Middle South Energy, Inc. v. Arkansas Public Service Commission, No. 84-5045 (8th Cir., Aug. 23, 1982).

The Court noted that Commissioner Bond concern about "the economic impact on Arkansas citizens caused by AP&L's participation in Grand Gulf." The

APSC EX. C

PUBLIC SERVICE COMMISSION
ARKANSAS

IN THE MATTER	
OF THE APPLICATION	
OF ARKANSAS POWER	
AND LIGHT COMPANY	DOCKET NO.
FOR APPROVAL OF	U-84-245-U
CHANGES IN RATES	
APPLICABLE TO	ORDER
RESIDENTIAL, GENERAL	NO. 35
SERVICE, INDUSTRIAL,	
AND OTHER RETAIL	
ELECTRIC SERVICE	

IN THE MATTER	
OF THE APPLICATION	DOCKET NO.
OF REYNOLDS METALS	U-8761-28
COMPANY FOR	
INTERPRETATION OF	ORDER
AGREEMENT FOR	NO. 4
ELECTRIC SERVICE	

ORDER

On November 9, 1984, Arkansas Power and Light Company (APSL) filed with this Commission an Application which initially resulted in a request for an increase in its electric rates of approximately $48 million (almost three times larger than any previous application). Of this amount

approximately 58 million was associated with the Grand Gulf Nuclear Unit No. 1 (Grand Gulf). On September 2, 1982, all of the parties hereto filed a Joint Motion for Approval of A Proposed Settlement Agreement.

The Commission would like to be in a position to reject this settlement. The record developed before us demonstrates that, as a matter of fairness right then as a matter of law, the ratepayers of Arkansas should not have to contribute to the payment for Grand Gulf 1.

It our decision could be based solely on our duties and discretion as provided by state law, we would reject this settlement.

If our discretion were not restricted by the rulings of a federal agency and certain decisions of federal courts, we would conclude that the rates established by this settlement are consistent with Arkansas consumers.

For these reasons we hate to approve this settlement, but under the circumstances we do not feel we have any choice.

We accept this settlement because of the overwhelming likelihood of what would occur in the federal courts if we were to reject the settlement.

If we dragged on rate increase for the allocation to AP&L of the Grand Gulf bland, we are convinced that the rates would then be set by the federal

costs and that those federal costs would require Arkansas consumers to pay a full 30% of Grand Gulf costs.

If has been suggested by a few that we all take out chances in the federal courts. But this suggestion ignores the reality of how the federal courts in this circuit have consistently ruled on related utility issues.

We have concluded that the limitations imposed on our discretion by the Federal Energy Regulatory Commission (FERC) order and by federal court rulings in this circuit force our acceptance of this settlement in order to assure Arkansas ratepayers that AP&L will pay a portion of the Grand Gulf I.

Discussions

In 1985 the Commission intervened in two FERC proceedings involving APSL. The Commission vigorously contested the unprecedented positions taken by the Louisiana parties. The Commission supported the zero percent allocation of Grand Gulf to APSL as advocated by all of the Middle South Companies.

On September 3, 1986, FERC Administrative Law Judge Ernest Diamond issued his initial decision in Docket No. ER-85-816-000, known as the Grand Gulf case. Therein Judge Diamond allocated to APSL responsibility for 36% of the $3.2 billion Grand Gulf Unit 1 located in Port Gibson, Mississippi, and owned by Middle South Energy, Inc.

and in essence unsatisfactorily attirmed Grand Gulf and System Agreement cases, issued its Order No. 534 directing the

On June 13, 1982, the full FERC affirmed its initial decision in the Grand Gulf allocation also in its Opinion No. 234 dated February 4, 1982, FERC Administrative Law Judge Daniel Head issued his initial decision in a combination case, Docket No. ER-82-483-000, known as the System Agreement case. Therein Judge Head rejected System-wide cost equalization but found that AP&L should pay approximately 33% of Grand Gulf 1. The Commission vigorously opposed this Grand Gulf allocation also in its affirmed to the full FERC.

On June 13, 1982, the full FERC

the decision of Judge Lieberman finding that MSU is a single, integrated, monolithic superutility, at least insofar as the construction of passload nuclear capacity is concerned. Using Grand Gulf I as its tool for equalizing the costs of all nuclear capacity on the MSU system (ANO, Grand Gulf, and Waterford 3)," the FERC order rectified Judge Lieberman's 36% allocation of Grand Gulf I to APSL. The Commission and other parties filed with the FERC requests for a rehearing on October 30, seeking a stay and an order that the rates charged by MSE on and after July 1, 1982, be subject to refund. The FERC denied a stay and refused to find that it could order the rates to be collected subject to refund, but has

That can't be good for the public interest; that might in ways that can't be quantified cost us more than even having a full share today of Grand Gulf costs.

As I see the case in federal court, even if what I just told you is wrong, even if we were to win in front of Judge Waters . . . and he were to find that this Commission is not preempted in conducting a prudency review, what we've won is the right to litigate the prudency issue, which of course we've already done . . . we've certainly won the right to have that issue go to at least the Arkansas Supreme Court and probably to . . . the U.S. Supreme Court. . . Again, it's a long, protracted struggle. It's expensive in more ways than one. . .

Whatever doubts you might have about this settlement, and I'm sure there are many, I would ask you to weigh them against the doubts . . .about the outcome of litigation. . . both sides are in a situation that if we get everything we want litigating it. . we lose.

On the otherhand, there is almost an in terrorem aspect of bankrupting them . . . I am not willing to go into the quicksand of the Bankruptcy Court with rates for Arkansas Power & Light, but if we win everything, I fear that's what would happen.

You can evaluate the risks of litigation on various scales. I think that for both sides the risks are high. I think that they are, to be frank, somewhat higher for the ratepayer than they are for AP&L, and I say that because, as I mentioned before, we have to win twice. We have to convince the federal system that there's no preemption barring us from going ahead and doing a prudency review. Then we have to convince the Commission and then we have to make it stick in the next court system that there was imprudence here.

The Company only has to win once. Therefore, I say to you that their litigative position is slightly better than ours. The risks of litigation for us are slightly greater - - bearing in mind that we are in if not a hostile at least what

is clearly an unfriendly federal appellate circuit on this issue.

I have concluded that the stockholder hit that we've been calling it, the retained share, represents something that I could in good conscience recommend to my clients as a proxy for a prudency adjustment of an excess capacity charge, one that distributes responsibility in a degree that I believe is within the range of reasonableness -- although it is certainly not as much as I would attempt to prove if we litigated this matter and certainly not as much as I think I could prove if we litigated it, but it is within the range of reasonableness, and given that, I can not only recommend it to my clients, but I can recommend it to you. From the litigative vantage point, then, and bearing in mind the practical realities of the marketplace, I can recommend to you honestly that you approve this settlement and put this controversy behind us.

> I think that our case for reversing FERC on the law is a strong case. I believe that we can achieve some modification of that decision, and I am hopeful that we can achieve a complete reversal. If this settlement is approved, we can turn our attention to what I think is really the important fight, the one that we've got the best chance to win, and you'll notice that appeals in that case have been filed in the D.C. Circuit and not the Eighth. [Emphasis added]

It is important to keep in mind the stated intentions of AP&L in the pending federal litigation. During the hearing on the Stipulation, Chairman Johnston addressed the following inquiry to AP&L's attorney, Mr. Jerry Jackson:

> Mr. Jackson, as I understand it. . . the position of AP&L is that if this Commission

rejects the settlement proposal, that under federal law, it is not within the discretion of this Commission to so reject and that under federal preemption and the so-called Narragansett Doctrine or the series of cases arising out of Narragansett that this Commission must pass through 100 percent of the cost and that AP&L would seek to litigate that question in federal District Court. Is that a correct interpretation?

MR. JACKSON: Mr. Chairman, . . .That is our position that we have taken throughout these proceedings.

Our position is simply that if the Commission does not [accept] the settlement . . . then it is our intent to press our claims in the pending case before the U.S. District Court to secure what we believe is the relief that we're entitled to under the law, and that is 100 percent recovery of the cost related to Grand Gulf.

Also, we firmly believe that the law is clear on the Federal Power Act, as we've stated before. That this

Commission really doesn't have discretion in this particular area. This area is preempted by the Federal Power Act, which invests in the FERC the sole, exclusive, and preemptive jurisdiction with respect to matters involving interstate sales of power in interstate commerce.

[Federal] Judge Woods' decision was very clear in his oral findings from the Bench that the states don't have any authority with respect to the pass-through of costs. The FERC has addressed that issue. And the Eighth Circuit in affirming Judge Woods on impact -- or interference on interstate commerce grounds stated that the states do not have the authority to essentially erect a fence around their boundaries to keep the Grand Gulf costs out.

So, Mr. Chairman, we believe we have a very, very strong legal position. That if this Commission rejects the settlement and does not permit the full recovery of Grand Gulf costs, then we believe that the federal court has no alternative but to find that this Commission should have

> allowed full recovery and will issue an order requiring full, 100 percent of these costs. [Emphasis added].

Therefore, it appears that we are faced with the unenviable decision of whether to gamble in the federal courts where we have already received clear signals that restrict our discretion regardless of the merits of the issues under state law or to approve a Stipulation urged upon us by all of the parties hereto. It is a gross understatement to say that this is a difficult decision. It is a bitter pill to swallow to say that Arkansans must shoulder any of the burden of Grand Gulf. Yet it appears that we must now swallow that bitter pill.

In considering the Stipulation filed by the Parties, the Commissioners have been forced to make certain assumptions as to future events and the underlying premises of the Stipulation. The very length and complexity of the various proceedings, which have led up to this Stipulation render it a practical impossibility for any one document to address and dispose of all conceivable assumptions and eventualities. Assuredly, each of the parties who were engaged in the negotiations have relied upon various assumptions in agreeing to the final product. Had we the luxury of time, we might wish to delve into those assumptions. However, time is not a luxury we have been afforded and,

therefore, we must make our own assumptions about existing ambiguities, as well as future events. The Commission deems it necessary to point out some, though by no means all, of the assumptions which, of necessity we have made in reaching our decision.

During the hearing of this matter senior officials of AP&L have addressed a number of cost-cutting or belt-tightening measures that have been implemented by the Company in recognition of and in response to its depressed financial circumstances. Measures undertaken or proposed by the Company in an effort to conserve cash, reduce expenses or otherwise improve its financial condition include but are not limited to the following: efforts

to measure and improve the productivity of its employees; the development of a more economical customer billing program; severely restricting or delaying construction projects to the greatest extent that is reasonable; cash conservation practices in the areas of travel restrictions, contributions, dues and fees deferment or deletion; a hiring freeze and conservative policy on promotions; frugality in executive salaries; reduction in legal fees; reduction in interest-free deposits at financial institutions; reduction in the work force through attrition; the possible implementation of a Materials Management Information System; restrictions on advertising

expenditures; the elimination or cut-back of Company programs that are presently unnecessary; and efforts to otherwise reduce general operation and maintenance expenses.

We assume that the Stipulation contemplates an ongoing voluntary effort on the part of AP&L to continue to pursue such austerity or cost-cutting measures in order to strengthen its financial position, thereby improving the probability of AP&L's continued ability to finance the deferral or phase-in of a portion of the Grand Gulf 1 costs as provided for in the Stipulation. The continuation of such measures further appears to be imminently reasonable in light of the sacrifices which the Company's

ratepayers are now being called upon to make. The continuation of such measures appears to be a reasonable course of action on the Company's part as it endeavors to maintain its ability to finance the deferral or phase-in. In the same vein we also assume that AP&L will exercise conservative restraint and fiscal responsibility in its consideration of future dividend payments and will maintain a dividend policy which will enhance its ability to finance deferrals. Additionally we assume that the Company's plan to relocate its corporate offices to the new Capitol Towers office building will produce a net economic benefit to the Company. Further, we assume that the Company will maintain its pension funds

at a reasonable level, i.e. not overfunded.

Grand Gulf Unit 2 is not addressed either directly or indirectly in the Stipulation; therefore, we can only assume that any future decisions regarding the cancellation or completion of Unit 2 will not affect the Stipulation nor will the Stipulation have an effect upon future regulatory treatment of the costs associated with Unit 2. By omission the Stipulation leaves unresolved those issues relating to the future regulatory treatment of Unit 2.

The Stipulation has as its foundation a myriad of economic and engineering assumptions, projections and forecasts which extend over a

considerable period of time. Our acceptance of the Stipulation is, therefore, based not only upon the sworn testimony and representation of the parties but also upon our assumption that the underlying projections and forecasts made by the parties are and will prove to be reasonably accurate.

This Stipulation is directed to AP&L and seeks to allow AP&L to remain financially viable, which would allow AP&L to finance the deferred Grand Gulf costs included in the Stipulation. The Commission assumes that AP&L will only be able to renegotiate or terminate the Stipulation on the basis of inadequate revenues or earnings, if AP&L itself has inadequate revenues or earnings,

not if a sister or parent company has inadequate revenues or earnings. The Commission further assumes that the funds paid by Arkansas ratepayers will not be used to subsidize Louisiana or Mississippi ratepayers or assume the obligations of MSU operating companies to the extent that ratepayers in those states fail to bear their proportionate share of Grand Gulf 1.

The Commission intends to pursue vigorously the appeals from the FERC decision in Opinion No. 234. We assume that AP&L will make a proportionate adjustment to the Retained Share, Inventory Share, and Current Recovery Share of Grand Gulf 1 costs in order to flow through any refunds or rate reductions ordered by the FERC or any

court as a result of the appeals of Opinion No. 234 or any other Grand Gulf 1-related action initiated at the FERC. For example, if a court reversed Opinion No. 234 and ordered MSE to decrease future rates to AP&L sufficiently to recoup past overcharges, AP&L would adjust retail rates to reflect that order. Similarly, if any court ordered a stay of Opinion No. 234 after AP&L had collected rates for Grand Gulf 1, AP&L would adjust retail rates to reflect that stay.

We are confronted with a Stipulation agreement to end, though not decide, the many thorny issues pending in this Docket. The stipulation is presented for our review

and approval, specifically contingent upon our approval without modification. Our only options are to "take it or leave it," although in this instance we take some comfort from the fact that the terms of the Stipulation were reached through long hours of hard bargaining and tough negotiations between AP&L and all other parties. We have not previously been presented a settlement in which any parties other than MSU and its subsidiaries had participated in negotiations.

The Stipulation and the preceding negotiations bring to mind the statement "He who arises from the table of compromise thinking he has won, has lost." While we cannot speak to the thought processes of any of the parties

actually at the table of compromise, the Commissioners are fully aware in accepting the Stipulation that we have not won nor have the people of Arkansas won; neither have we lost. We have accepted a Stipulation which we believe to be in the public interest. Hopefully, we have put an end to years of costly litigation, to the potential for federal courts to further encroach upon the state's right to set retail electric rates and to the uncertainty of possible bankruptcy proceedings. We have enhanced the ability for all the parties to fully devote our time and resources to overturning the unjust decision of the FERC which engendered the present situation.

The Commission spent many long hours reviewing the Stipulation and approximately three hundred pages of documents, tables and charts sumitted with it. We held a public hearing of approximately four hours duration, during which comments were heard from nineteen citizens and testimony from six witnesses. Fifteen members of the public spoke in support of the settlement and the witnesses for the parties testified in support of the settlement. We have spent hours deliberating and reviewing the Stipulation, the transcript, as well as, drafting our opinion.

We have been presented with this Stipulation at the "eleventh hour." We are urged by all parties, parties who

have been bitter adversaries in this docket, to accept this Stipulation. We accept the Stipulation in the spirit in which it was presented to us, as the best of two bad alternatives. In approving it, we find that it produces rates which are in the public interest under the circumstances at this time. We do not by accepting the Stipulation abdicate our authority to set just and reasonable rates nor do we in any way deregulate AP&L now or for the duration of this Stipulation.

Therefore, based upon the sworn testimony and representation of the parties hereto, including the assumption that the projections supporting the Stipulation are and will prove to be reasonably accurate; based

upon the current status of the law in the 8th Circuit and recognizing that the law concerning preemption of the state's role in this matter is unsettled; based upon the present apparent enforceability of the FERC order, unless and until it is reversed or modified; based upon the current financial condition of AP&L; and, based upon the other presently existing circumstances as we appreciate them, we accept the Stipulation as a reasonable conclusion of this Docket. By accepting this Stipulation, we neither address nor decide the other controversial issues presented to us in this Docket.

IT IS, THEREFORE, ORDERED:

1. That the Stipulation entered into between Arkansas Power & Light Company, the Staff of the Arkansas Public Service Commission, Steve Clark, Attorney General of Arkansas, Reynolds Metals Company, Arkansas Electric Energy Consumers, and Southern Cotton Ginners Association, as filed herein, including Rate Schedule Rider M33 and Rate Schedule Rider M32, is hereby accepted, and approved.

2. That for purposes of implementing the Stipulation entered into by the parties in this proceeding, the revised rate schedules filed by Arkansas Power & Light Company in Docket No. 84-249-U, be, and the same are, hereby disapproved and the Company is authorized to file in lieu thereof

revised rate schedules consistent with the Stipulation. We find and determine that rate schedules consistent with our findings herein will be the just and reasonable rate or rates to be charged by AP&L for its service in Arkansas.

3. That the revised rate schedules to be filed for Commission approval pursuant to this Order, shall be effective for service rendered on and after September 9, 1985.

4. That the accounting entries submitted with the Stipulation, which assure future collection of any deferred costs under the phase-in and inventory provisions of Rider M33 as well as the deferred return on excess capacity, and Rate Schedule Rider M32, are approved.

BY ORDER OF THE COMMISSION

This 9th day of September, 1985.

/s/

Dr. Robert E. Johnston, Chairman

/s/

James W. Daniel, Commissioner

/s/

Patricia S. Qualls, Commissioner

/s/

Melinda Mills
Secretary of the Commission

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-895

In The

Supreme Court of the United States

October Term, 1985

RATEPAYERS FIGHT BACK,
Petitioner,

VS.

MIDDLE SOUTH ENERGY, INC.,
ARKANSAS POWER & LIGHT COMPANY,
ARKANSAS PUBLIC SERVICE COMMISSION AND
ATTORNEY GENERAL OF ARKANSAS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF IN OPPOSITION ON BEHALF OF MIDDLE SOUTH ENERGY, INC. AND ARKANSAS POWER & LIGHT COMPANY

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QUESTIONS PRESENTED

1. Does the Arkansas Public Service Commission share concurrent jurisdiction with the Securities and Exchange Commission to regulate contracts pertaining to the construction and financing of an interstate wholesale power project and the sale of power therefrom?

2. Can the Federal Energy Regulatory Commission preempt the jurisdiction of the Arkansas Public Service Commission to regulate such contracts?

3. Can the Commerce Clause of the United States Constitution prohibit state regulation of such contracts?

4. Should the courts below have refrained from hearing this case under the abstention doctrine?

5. Did the courts below lack jurisdiction to hear this case by virtue of the "well-pleaded complaint" rule?

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STATEMENT OF THE CASE

In order that the Court may have a proper understanding of the issues involved in this case, petitioner's statement of the case must be supplemented to review briefly the events which culminated in this litigation and which have transpired since the Eighth Circuit entered its decision herein. In the late 1960's, Middle South Utilities, Inc. ("MSU")[1] determined that a need existed in its service area for additional generating capacity. To meet this need, the decision was made to build the Grand Gulf Project, a nuclear generating facility near Port Gibson, Mississippi. To facilitate the financing of the Grand Gulf Project ("Grand Gulf" or the "Project"), MSU created a wholly-owned subsidiary, Middle South Energy, Inc. ("MSE") to own and finance construction of the Project.

In 1974, shortly after its creation, MSE entered into a contract for the sale of Grand Gulf power (the "Availability Agreement") with the operating subsidiaries of MSU, namely Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L") and New Orleans Public Service, Inc. ("NOPSI"). *Appendix to Brief in Opposition*, Part A. The Availability Agreement was used by MSE, but not by AP&L or the other operating companies, as collateral for a Bank Loan Agreement with various financial institutions. MSE assigned its rights un-

---

[1]The following disclosure is made pursuant to Rule 28.1 of the Supreme Court Rules. Arkansas Power & Light Company and Middle South Energy, Inc. are subsidiaries of MSU. Other corporations in the MSU system include, Associated Natural Gas Company, Arklahoma, Electric, Inc., Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc., Middle South Services, Inc. and Systems Fuel, Inc.

der the Availability Agreement to its creditors, with the consent of the operating companies. *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission,* 593 F.Supp. 363, 364-65 (E.D. Ark. 1984). The assignments did not enlarge or otherwise alter the power purchase obligations of the operating companies.

The Arkansas Public Service Commission (the "APSC" or "Commission") was notified of the execution of the Availability Agreement but made no objection thereto. The Availability Agreement, as a transaction between public utilities registered under the Public Utility Holding Company Act of 1935 and not as an issuance of securities as contended by the petitioner, was reviewed by the Securities and Exchange Commission (the "SEC"). The APSC did not participate in that review. *Appendix to Brief in Opposition,* Part B.

The original Availability Agreement did not specify the exact percentages of power to be purchased from the Project by the operating companies. In 1981, the Availability Agreement was amended to allocate specific percentages as follows: AP&L, 17.1%; LP&L, 26.9%; MP&L, 31.3%; and NOPSI, 24.7%. The 1981 amendment also provided that the sale of power from Grand Gulf could be made pursuant to a subsequent power purchase agreement which could provide for an allocation of power on a different basis than that set forth in the Availability Agreement. Later in 1981, a Reallocation Agreement was negotiated which superseded the 1981 amendment to the Availability Agreement and which allocated no power to AP&L, while allocating greater shares thereof to LP&L, MP&L, and NOPSI. *Middle South Energy, Inc. v. Arkansas Public Service Commission, supra,* at p. 365. The Reallocation Agreement was subsequently reviewed by the SEC as an

agreement between public utilities in a proceeding in which the APSC did not participate. *Appendix to Brief in Opposition,* Part B.

Although the Availability Agreement, the 1981 amendment thereto and the Reallocation Agreement addressed the sale of power from Grand Gulf, those agreements were never submitted to the Federal Energy Regulatory Commission (hereinafter "FERC") for its approval because, when they were executed, the commercial operation of Grand Gulf was a number of years away. In 1982, with Unit No. One of the Project nearing completion, MSE filed with the FERC a Unit Power Sales Agreement (the "UPSA"), a rate schedule for the sale of Grand Gulf power. Consistent with the Reallocation Agreement, the UPSA placed no responsibility to purchase power from Grand Gulf on AP&L. The UPSA was assigned to FERC Docket No. ER82-616-000. Because of the relatively high initial costs of Grand Gulf power, parties from Arkansas, Louisiana, Mississippi and Missouri intervened in the FERC proceeding and sought to minimize the amounts of power to be allocated to their respective states. Specifically, the APSC intervened in FERC Docket No. ER82-616-000 to oppose the allocation of *any* Grand Gulf costs to Arkansas. *See generally, Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 772 F.2d 404, 408-9 (8th Cir. 1985).

On February 3, 1984, the presiding Administrative Law Judge in Docket No. ER82-616-000, the Honorable Ernst Liebman, issued an Initial Decision modifying the UPSA by assigning 36% of the costs of Grand Gulf power to AP&L, and by reducing the allocations received by the other operating companies. The various Arkansas parties, including the APSC, appealed the Initial Decision to the

FERC. *Appendix to Memorandum of APSC, Exhibit C,* p. 6.

On March 12, 1984, while appeals of the Initial Decision were pending, the APSC opened two dockets, Nos. 84-040-0II and 84-041-0II, to "investigate" the Grand Gulf Project. *Appendix to Brief in Opposition,* Parts C and D. In Order No. 1 in the latter docket, after stating that the Initial Decision could raise AP&L's rates by $310 million in 1985 alone, the Commission said:

> This investigation, however, will look forward to ascertain what the ratepayers of AP&L, AP&L itself, the Commission, the Governor, and the General Assembly may do to circumvent or deflect the economic harm that looms over the state from the imminent prospect of being mandated by a federal agency to pay for a power generating plant. . . . *Appendix to Brief in Opposition,* Part D.

Meanwhile, the APSC intervened before the SEC in an attempt to block the approval of MSE financing which was necessary to complete the Project. *Id.,* at Part B. Subsequently, on August 1, 1984, following hearings in APSC Docket No. 84-040-0II, the Commission issued a show cause order commanding AP&L to appear and show cause:

> Why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operating costs of the Grand Gulf Project should not be held void *ab initio* as a matter of law. Docket No. 84-190-U, Order No. 1 (August 1, 1984). As quoted in *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al,* 593 F.Supp. 363, p. 366.

MSE, a party to certain of these contracts, filed suit on Augsut 31, 1984, to enjoin any further action by the APSC in its show cause proceeding. On September 14,

1984, the District Court enjoined the APSC's efforts to nullify the Grand Gulf contracts as an impermissible infringement upon the exclusive jurisdiction of the FERC. *Id.* A panel of the Eighth Circuit Court of Appeals, on August 23, 1985, upheld the result reached by the District Court but, rather than deciding the question of federal preemption, held that the actions of the APSC violated the Commerce Clause.

In November of 1984, while appeals of Judge Liebman's Initial Decision and the District Court's judgment were still pending, AP&L filed with the APSC an application seeking to recover in its retail rates any Grand Gulf costs which might ultimately be imposed upon it by the FERC. In accordance with state law, the Commission suspended AP&L's application. In 1985, the APSC commenced hearings in the AP&L rate case, one of the issues in which was whether AP&L could recover some or all of its share of the costs of Grand Gulf power. *See generally, Appendix to Memorandum of APSC,* Part C.

On June 13, 1985, the FERC, in Opinion No. 234, approved the allocation of Grand Gulf costs as established in the Initial Decision, effective as of the date when Grand Gulf began commercial operation, July 1, 1985. The APSC had not, however, as of that date approved rates for AP&L which would have allowed it to pass through its retail customers its share of Grand Gulf costs, which amounted to approximately $1 million a day. On August 13, 1985, AP&L filed suit in the District Court in *Arkansas Power & Light Company v. Arkansas Public Service Commission, et al.,* U.S. Dist. Ct., E.D. Ark., Case No. LR-C-85-571, seeking an order compelling the APSC to allow it to recover its Grand Gulf costs in its retail rates. *Appendix to Memorandum of APSC, Exhibit* C, p. 17.

While AP&L's lawsuit was pending, the Eighth Circuit Court of Appeals entered its decision affirming the District Court's decision in the present case. Thereafter, on September 5, 1985, AP&L, the Commission Staff, the Attorney General of Arkansas, the Southern Cotton Ginners Association, Arkansas Electric Energy Consumers and Reynolds Metals Company, representing all the parties to the AP&L rate proceeding, entered into a Stipulation and Settlement Agreement pursuant to which AP&L agreed to absorb some of its Grand Gulf costs and to defer collection of a portion of other such costs, with rates designed to collect the remaining costs to take effect immediately. As part of the Stipulation and Settlement Agreement, the parties thereto agreed to terminate all pending litigation involving the Grand Gulf controversy, except for their appeals of FERC Opinion No. 234. *Appendix to Memorandum of APSC, Exhibit B.*

On September 9, 1985, the APSC issued its Order No. 26 in Docket No. 84-249-U, which approved the Stipulation and Settlement Agreement. Consistent with the settlement, AP&L dismissed its pending federal lawsuit against the APSC and the Commission withdrew its petition for rehearing before the Eighth Circuit in the case at bar. *Id.* at *Exhibit C.* Pursuant to the settlement, AP&L currently has in effect retail rates, approved by the APSC, which allow it to recover a portion of the costs it is presently incurring under FERC Opinion No. 234.

———o———

SUMMARY OF THE ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The court below correctly found that the Public Utility Holding Company Act of 1935 did not confer on the states

the power to unduly restrict the wholesale sale of electric power in interstate commerce.

II. THE DECISION BELOW DOES NOT MISCONSTRUE THE FEDERAL POWER ACT.

The Eighth Circuit did not reach the question of state jurisdiction under the Federal Power Act and its opinion does not raise a substantive federal question in regards thereto. The District Court correctly found that the APSC could not interfere with the FERC's jurisdiction over wholesale sales of electric power in interstate commerce.

III. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT CASES INTERPRETING THE COMMERCE CLAUSE.

The Court of Appeals, based upon a finding that the actions of the APSC represented simple economic protectionism, properly upheld the District Court, consistent with *Bacchus Imports, Ltd. v. Dias*, 468 U.S. —, 104 S.Ct. —, 82 L.Ed.2d 200 (1984) and other decisions of this Court.

IV. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE ABSTENTION DOCTRINE.

The lower courts correctly exercised jurisdiction to enjoin *ultra vires* state action which infringed upon the exclusive jurisdiction of the FERC and which unduly restricted interstate commerce.

V. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE WELL-PLEADED COMPLAINT RULE.

The well-pleaded complaint rule is inapplicable to the case at bar under *Lawrence County, et al. v. Lead-Deadwood School District*, 469 U.S. —, 83 L.Ed.2d 635, 460 n. 6, 105 S.Ct. — (1985).

VI. THE CASE DOES NOT PRESENT A JUSTICIABLE ISSUE WITHIN THE JURISDICTION OF THE COURT.

In light of the Stipulation and Settlement Agreement among the parties to AP&L's retail rate case, in which the APSC agreed to terminate the show cause proceeding at issue herein, this appeal is moot.

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

As its first ground for a writ of certiorari, the petitioner postulates a conflict with the decision of the Eighth Circuit, which struck down the APSC's show cause order on Commerce Clause grounds, and the requirements of the Public Utility Holding Company Act of 1935 ("PUHCA"). According to the petitioner, the decision below is inconsistent with the system of concurrent state and federal regulation of public utility securities which has developed under PUHCA.

The petitioner misconstrues the nature of concurrent jurisdiction as defined by the recent decisions of this Court. For example, in *Edgar v. Mite Corporation,* 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), the Court held that an Illinois statute regulating corporate takeovers was invalid as a burden on interstate commerce after finding that the concurrent jurisdiction enjoyed by the state of Illinois to regulate securities under the Securities Act of 1933 did not insulate the state from the restrictions placed on it by the Commerce Clause. As the *Edgar* case demonstrates, concurrent jurisdiction simply means that federal regulation in a given area will not invariably preempt

state regulation in that area; it does not mean that the states are free to ignore constitutional limiations on their power.[2] There is no reason to believe that the states' concurrent jurisdiction under PUHCA is any broader than their jurisdiction under the Securities Act for purposes of reviewing state action under the Commerce Clause.

Congress could, of course, grant to the states regulatory authority that the Commerce Clause would otherwise deny them but, with regard to the regulation of utility securities, this was not done. The petitioner attempts to read into PUHCA Sections 1(b) and (c), which decry the evils of unregulated holding companies, a broad grant of power to the states. *See,* 15 U.S.C. §§ 79a (b) - (c). The effort is unsuccessful. These sections are best seen merely as declarations of Congressional policy, not as a deliniation of regulatory authority. *See, United Gas Improvement Company v. Securities and Exchange Commission,* 138 F.2d 1010, 1022 (3rd Cir. 1943) (interpreting 15 U.S.C. § 79a(c)). More importantly, Section 1(a) itself states the Congressional finding that holding companies and public utilities, because their activities extend "over many states are not susceptible to effective control by any state." 15

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[2]The point is well illustrated by the state cases striking down on Commerce Clause grounds state efforts to regulate security issues by multi-state utilities and carriers, despite the obvious presence of concurrent jurisdiction in the absence of undue restrictions on interstate commerce. *See, United Air Lines, Inc. v. Illinois Commerce Commission,* 31 Ill.2d 516, 207 N.E.2d 433 (1965); *United Air Lines, Inc. v. Nebraska State Railway Commission,* 172 Neb. 784, 112 N.W.2d 414 (1961); *State of North Carolina, ex rel Utilities Commission v. Southern Bell Telephone and Telegraph Company,* 288 N.C. 201, 217 N.E.2d 543 (1975); *Panhandle Eastern Pipe Line Company v. Public Utilities Commission of Ohio,* 56 Ohio St. 334, 383 N.E.2d 1163 (1978); *Western Union Telegraph Company v. Michigan Public Service Commission,* 338 N.W.2d 731 (Mich.App. 1983).

U.S.C. § 79a(a). In light of this language, the immediately subsequent Sections 1(b) and (c) cannot reasonably be interpreted as evidence of a Congressional intent to grant to the states unfettered discretion to regulate whatever the state authorities might claim to be a "security."

The petitioner also points to Section 7(g), which provides that an issuer must comply with state law before a declaration to sell securities under PUHCA may become effective, as another source of state authority to regulate interstate security issues without regard to the Commerce Clause. *See*, 15 U.S.C. § 79g(g). This argument incorrectly assumes that the agreements in question are "securities". *See*, 15 U.S.C. § 79b(a)(16). The show cause order itself focuses on the agreements as purchase power contracts; AP&L was ordered to appear and "show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf project should not be held to be void *ab initio* as a matter of law." *See, Statement of Case.* At the hearing before the District Court neither the Commission nor the petitioner presented any evidence that the agreements in question were securities.[3] The District Court itself found that:

> The Availability Agreement and amendments thereto are agreements for the purchase of power in interstate commerce or are so integrally related to such purchases that they are subject to the exclusive jurisdiction of the FERC. The other documents which the

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[3]The APSC's order never addressed the question of whether the Grand Gulf contracts were securities under federal law, and as to their status under state law, said only that they "may constitute evidences of indebtedness. . . ." *Appendix to Petition for Certiorari*, A-101.

> APSC seeks to review and regulate are essential to the interstate wholesale of power and therefore are not subject to state jurisdiction. *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 593 F.Supp. 366.

The petitioner's argument that the subject agreements are "securities" is based not on evidence in the record but largely on the fact that they were filed with the SEC. This argument incorrectly assumes that SEC jurisdiction is limited to the regulation of securities. In fact, SEC jurisdiction under PUHCA extends to a wide range of transactions between affiliated utility companies. For example, Section 13 of PUHCA gives the SEC authority over "any service, sales or construction contract" between affiliated members of a registered public utility holding company. 15 U.S.C. § 79m. Contracts of this type are obviously not securities, but they must be filed with and approved by the SEC. *Compare,* 15 U.S.C. § 79b(a)(16) (defining "security") with 15 U.S.C. § 79(a)(19) (defining "service contract"), 15 U.S.C. § 79b(a)(20) (defining "sales contract") and 15 U.S.C. § 79b(a)(21) (defining "construction contract"). In a similar vein, Section 12 of PUHCA vests the SEC with jurisdiction over various financial dealings between the affiliates of a registered public utility holding company. 15 U.S.C. § 79L.

In arguing that Section 7(g) conferred on the APSC jurisdiction to regulate the Grand Gulf contracts, the petitioner would lead this Court to believe that the Availability Agreement, the amendments to it, *MSE's* assignments of it, and the operating companies' consent to those assignments, were filed with the SEC under Sections 6 and 7 of PUHCA (which regulate security issues) since

only a filing under those provisions would require compliance with state law under Section 7(g). 15 U.S.C. §§ 79f-79g. In reality, the Availability Agreement was filed with and approved by the SEC under Section 12(b), not Sections 6 or 7.

The SEC addressed this precise issue in *Re Middle South Utilities, Inc.*, SEC File Nos. 70-6906, 70-7021 and 70-7026, in which the APSC intervened before the SEC in an effort to block the sale of securities intended to help finance completion of the Project. The APSC argued that the transactions should not be allowed since it had never approved the contracts subject to its show cause order. The APSC argued to the SEC that the indemnity provisions of the Availability Agreement might be an "evidence of indebtedness" under Arkansas law, or, in other words, a security. The SEC expressly refused to decide whether the indemnity provisions could be considered securities.[4] The SEC did, however, find that the availability Agreement had been filed under Section 12(b), which did not confer on the APSC the jurisdiction it was claiming. The SEC also found that MSE's assignments of its rights under the Availability Agreement were not securities. "[T]he assignment of the availability agreement in connection with the bond issuances does not constitute an issuance or sale by APL of a security and therefore does not grant the Arkansas Commission the type of jurisdiction prerequisite to Section 79(g)." The SEC made a similar finding regarding the consents by AP&L to the assignments. In short, the SEC itself has rejected the position now advanced by the petitioner with regard to the

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[4]The SEC found that the indemnity provisions were irrelevant to the proposed stock sale under consideration.

assignments of the Availability Agreement and the consents thereto.

The first question posed by the petitioner—whether PUHCA would permit state regulation otherwise prohibited by the Commerce Clause—is best answered by Section 21, which states that nothing in the act shall "affect" the jurisdiction of any state commission over any security or contract, insofar as the exercise of such jurisdiction does not conflict with the act. 15 U.S.C. § 79u. Section 21 is a "saving" clause intended to protect the states from preemption, but not, as the petitioner argues, to authorize otherwise unconstitutional action. The critical word in Section 21 is "affect," a term Congress would not likely have used to confer additional power on the states. "Affect" can mean "to act upon; influence; change; enlarge or abridge." *Black's Law Dictionary* (Rev. 4th Ed. 1968) p. 79. "Affect" may also mean "to produce an effect upon." *Webster's New Collegiate Dictionary* (1981) p. 19. Given the ordinary usage of the word "affect," Section 21 cannot be seen as a grant of power to the states.

In summary, the conclusion reached by the Eighth Circuit is entirely consistent with this Court's decision in *Edgar v. Mite Corporation, supra,* and the state cases cited in footnote two hereof. No error or conflict with other appellate decisions exists which would justify certiorari herein.[5]

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[5]The one case cited by the petitioner as upholding state regulation, *Indiana & Michigan Power Company v. State of Michigan,* 275 N.W.2d 450 (Mich. 1979), involved intrastate transactions surrounding the construction of an in-state plant and is distinguishable. Note the result reached by the Michigan courts in cases involving multi-state operations, *Great Lakes Transmission Company v. Michigan Public Service Commission,*

(Continued on following page)

II. THE DECISION BELOW DOES NOT MISCONSTRUE THE FEDERAL POWER ACT.

A. The Eighth Circuit Did Not Address The Issue Of Federal Preemption Under The Federal Power Act.

The petitioner's second ground for a writ of certiorari —that the Eighth Circuit wrongly interpreted the Federal Power Act to preempt the APSC's nullification of the Grand Gulf contracts--is wholly without merit, since the court did not even decide that issue. Although the District Court held that the APSC had been preempted, the Eighth Circuit upheld the trial court's injunction on other grounds. On the question of preemption, the Eighth Circuit said that:

> We are not convinced that the district court improperly based its decision on preemption grounds. Nevertheless, *we choose not to address the difficult question of whether the authority denied them under the Federal Power Act may be granted to them by the Holding Company Act.* . . . [Emphasis added.] *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 722 F.2d 404.

Implicit in Rule 17.1 of the Supreme Court Rules, which addresses the considerations governing review on certiorari, is the assumption that the lower court reached a decision on the question for which review is sought. In view of the Court's customary refusal to decide questions

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180 N.W.2d 59 (Mich. Ct.App. 1970) and *Western Union Telegraph Company v. Michigan Public Service Commission, supra*. Note also that the transactions involved in *Indiana and Michigan Power Company v. Michigan Public Service Commission, supra*, were beyond question securities, while in the present case, it has merely been alleged that the Grand Gulf contracts might be securities. Most importantly, the Michigan Supreme Court did not hold that PUHCA permitted state regulation which would otherwise be unconstitutional.

not addressed by the Courts of Appeals, an issue not determined by the Eighth Circuit should not warrant review on certiorari. *See, United States v. Fleischman*, 339 U.S. 349, 70 S.Ct. 739, 94 L.Ed. 906 (1950); *Owens v. Union Pacific Railroad Company*, 319 U.S. 715, 63 S.Ct. 1271, 87 L.Ed. 1683 (1943). *See also, New York v. Uplinger*, — U.S. —, 104 S.Ct. —, 81 L.Ed.2d 201 (1984) (dismissing writ as improvidently granted where constitutional issue presented was "uncertain"). At the very least, a successful petitioner should be required to show that if the question for which review is sought was not decided by the appeals court, a different result might have been reached had that issue been addressed. Otherwise review becomes a purely academic and irregular exercise, since the "Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

In the posture of this case, the issue of federal preemption cannot satisfy the test of simple relevance, much less the requirement under Rule 17 that a "special and important" federal question be presented. Not only did the Eighth Circuit not address the question of federal preemption, resolution of that issue was not necessary to affirm the decision of the District Court. Only if this Court were prepared to reverse the Eighth Circuit's holding that the actions of the APSC violated the Commerce Clause, would the question of federal preemption become relevant to the outcome of this case. Standing alone, the issue of preemption does not justify further review in this case.

B. The District Court Correctly Found That The APSC's Show Cause Order Was Preempted By The Federal Power Act.

The petitioner concedes, but dismisses as irrelevant, federal preemption under the Federal Power Act of state

authority over wholesale power sales in interstate commerce. The petitioner also apparently concedes that the effect of the Federal Power Act was "to draw a bright line easily ascertained, between state and federal jurisdiction over" retail and wholesale electric rates. *Federal Power Commission v. Southern California Edison Company, et al.*, (the *Colton* case), 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed 2d 638 (1964). In seeking to overturn the decision of the District Court, the petitioner attempts to defend the APSC's show cause order as an exercise of state jurisdiction over securities, which is usually allowed. *See,* 16 U.S.C. 824(c). *See also, Jersey Central Power & Light Company v. Federal Power Commission,* 319 U.S. 61, 63 S.Ct. 953, 87 L.Ed 1258 (1943).

Despite the characterization given to the APSC's order by the petitioner, both lower courts recognized that this case involves the allocation of the cost of wholesale power sold in interstate commerce, not the intrastate regulation of securities. The Court need not, however, address the complex issue of the precise nature of the Grand Gulf contracts, for even when a state acts in an area in which it generally has jurisdiction, it may not act in a way which frustrates federal regulation.

Although no one would deny that the states retain the jurisdiction to regulate retail rates, few would argue today that such jurisdiction could be used to frustrate an FERC order by refusing to allow a utility to recover in its retail rates FERC-imposed wholesale expenses. *See, Narragansett Electric Company v. Burke,* 119 R.I. 559, 381 A.2d 1358 (1977), certiorari denied 435 U.S. 972[6] Like-

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[6]*See also, People's Counsel of the District of Columbia v. Public Service Commission,* 444 A.2d 975 (D.C. App. 1982); *City of Chicago v. Illinois Commerce Commission,* 13 Ill.2d

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wise, state jurisdiction over generating facilities ought not to be used to disrupt federal regulation of the wholesale power market. *State of Utah v. Federal Energy Regulatory Commission*, 691 F.2d 444 (10th Cir. 1982). And despite the allegations of the petitioner, state jurisdiction over securities cannot be used to frustrate federal regulation. *Natural Gas Pipeline Company of America, et al. v. Illinois Commerce Commission*, 210 N.E.2d 490 (Ill. 1965); *Great Lakes Transmission Company v. Michigan Public Service Commission, supra.*[7] As this Court made clear in *Northern Natural Gas Company v. State Corporation Commission of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963), which struck down a state order compelling the pro rata taking of natural gas from wells, but which did not attempt to control prices directly, state action which even indirectly interferes with federal regulation is forbidden.

A finding of preemption in the case at bar hinges on the practical effect which the APSC's show cause order, if

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607, 150 N.E.2d 776 (1958); *Eastern Edison Company v. Department of Public Utilities*, 338 Mass. 292, 446 N.E.2d 684 (1983); *Northern States Power Company v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn. 1984), certiorari denied 82 L.Ed. 2d 850; *United Gas Corporation v. Mississippi Public Service Commission*, 240 Miss. 405, 127 So.2d 404 (1961); *Northern States Power Company v. Hagen*, 314 N.W.2d 32 (N.D. 1981); *Citizens Gas Users Association v. Public Utilities Commission*, 165 Ohio St. 536, 138 N.E.2d 383 (1956).

[7]The petitioner's attempts to distinguish these cases on the basis that they arose under the Natural Gas Act, which gives the FERC jurisdiction over security issues by interstate natural gas pipelines, while no similar provisions exist with respect to electric utilities under the Federal Power Act. But the principle for which these cases stand, as the previously cited decisions show, is not unique to the Natural Gas Act.

not enjoined, would have had on Judge Liebman's order, which is essentially a factual question. Both the District Court and the Court of Appeals recognized that the Initial Decision would have been frustrated if MSE had been denied access to the capital markets so that Grand Gulf could not have been completed and the power sales contemplated by Judge Liebman could not have been made.[8] The District Court found that:

> If the actions of the APSC are not enjoined, the cost of capital to MSE will be raised to the point that the Project is jeopardized, and the ability of MSE to provide its multi-state wholesale customers with power will be irreparably impaired. *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 593 F.Supp. 366-67.

As the Eighth Circuit said, "essentially, the APSC is trying to secure for Arkansas the zero allocation embodied in the UPSA. Such a result would be contrary to the 36% allocation recently approved by the FERC in regulating the wholesale aspects of the Grand Gulf project." *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission*, 771 F.2d 411. In short, both courts realized that the actions of the APSC could not square with the cost allocations established by the FERC, a critical factual determination to which this Court should defer. *See, Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, 580, n. 6 (1980).

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[8]The Court of Appeals noted that counsel for the APSC had stated that "if the APSC voids AP&L's part (of Grand Gulf), the whole thing goes down the toilet." 772 F.2d 413, n.17. The Eighth Circuit also pointed out that the SEC had calculated that a delay of just one month in completing the Project would cost MSE $28 million. *Supra* at p. 409, n. 11.

III. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT CASES INTERPRETING THE COMMERCE CLAUSE.

The petitioner has further alleged that the Eighth Circuit erred in affirming the District Court on Commerce Clause grounds. Beyond question, however, the Commerce Clause, standing alone, may prohibit state action which unduly restricts the free flow of trade among the states. *Armco, Inc. v. Hardesty*, — U.S. —, 104 S.Ct. —, 81 L.Ed. 2d 540 (1984). The result below is consistent with this rule.

The petitioner's attack on the Eighth Circuit's holding is threefold. First, the petitioner repeats its argument that the state action at issue herein is protected by PUCHA. Second, it is alleged that the Eighth Circuit misstated the APSC's motives in finding that the Commission was attempting to close the borders of Arkansas to power from Grand Gulf. Third, it was alleged that the APSC's order would have only an incidental effect on interstate commerce and should, therefore, have been permitted under *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

The first prong of the petitioner's argument is a repetition of previous allegations and has been adequately addressed under Point I herein.[9] The petitioner's second argument that the APSC was not trying to embargo Grand Gulf power contradicts the facts in the record, as the foregoing discussion makes clear. The APSC's show

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[9]The passages quoted by the petitioner from the SEC opinion rejecting the APSC's attempt to block MSE security issues not at issue herein do not, as the petitioner claims, support state jurisdiction regardless of constitutional considerations. Those passages simply refuse to decide the state law or federal preemption claims raised by APSC and do not even consider the limitations placed on the APSC by the Commerce Clause. *See, Petition*, pp. 53-54.

cause order itself recognized that "the construction of the Grand Gulf Project was and is dependent on the agreements enumerated" therein. *Appendix to Petition*, p. A-99. The APSC's attempted nullification of the Grand Gulf contracts must be seen as an effort to evade responsibility for Grand Gulf costs by destroying the Project itself.

In light of the APSC's recognition of the importance of the agreements it sought to void, the claim that the show cause order would have only an "incidental" effect on interstate commerce and should be upheld under *Pike v. Bruce Church, supra*, must be rejected. The Project was owned by a multi-state holding company, was designed to serve customers in several states, was financed by investors throughout the world and was not even located within the State of Arkansas. State action threatening such a facility would obviously have more than an incidental effect on interstate commerce.

The Court need not, however, reach the question of whether the APSC's order would have affected interstate commerce only incidentally. The flexible test established in *Pike v. Bruce Church, supra*, is inapplicable in cases involving the type of "economic protectionism" displayed by the APSC, to which a virtual *per se* rule of invalidity applies. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. —, 104 S.Ct. —, 82 L.Ed.2d 200 (1984); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed. 2d 702 (1980). A finding of "economic protectionism" may rest either on evidence of a discriminatory intent or a discriminatory effect. *Bacchus Imports, Ltd. v. Dias, supra*, at p. 208. A discriminatory intent can easily be inferred from the APSC's efforts before the FERC to shift Grand Gulf costs from Arkansas to ratepayers in Louisiana and Mississippi. As recently as September 9, 1985,

when it approved the stipulation settling AP&L's retail rate case, the APSC said that "it is a bitter pill to swallow to say that Arkansas must shoulder any of the burden of Grand Gulf." *Appendix to Memorandum of APSC, Exhibit C*, p. 28. As to a discriminatory effect, the destruction of the Project, which is the APSC's apparent objective, would have deprived citizens of other states of a major power supply, solely to protect the interests of Arkansas as perceived by the APSC. *See, New England Power Company v. New Hampshire, et al.*, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

IV. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE ABSTENTION DOCTRINE.

The petitioner has alleged that the courts below should have abstained from exercising jurisdiction. The abstention doctrine, however, is based on the need to respect lawful state procedures, not clearly *ultra vires* efforts to circumvent federal regulation. *See, Public Utilities Commission of Ohio v. United Fuel Gas Corporation*, 317 U.S. 456, 63 S. Ct. 369, 87 L.Ed. 396 (1943) (enjoining state Commission order attempting to set wholesale gas rates). The mere pendency of the show cause proceeding would have jeopardized MSE's ability to secure financing to complete the Project. Even if the APSC had ultimately decided not to abrogate the Grand Gulf contracts, abstention by the courts below would have at least delayed MSE's attempts to raise capital and would have increased the cost thereof.

V. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE WELL-PLEADED COMPLAINT RULE.

Consistent with the weight of authority, the Eighth Circuit concluded that the possibility that the claims raised

by MSE in is complaint might also be raised as defenses by AP&L in the APSC's show cause proceeding did not bar the exercise of federal jurisdiction under the "well-pleaded complaint" rule. *See, Braniff International, Inc. et al. v. Florida Public Service Commission, et al.*, 576 F.2d 1100 (5th Cir. 1978); *Illinois v. General Electric Company, et al.*, 683 F.2d 206 (7th Cir. 1982); *Conference of Federal Savings and Loan Associations, et al. v. Stein*, 604 F.2d 1256 (9th Cir. 1979); *Town of Springfield, Vermont, et al. v. McCarren, et al.*, 549 F.Supp. 1134 (D. Vt. 1982). Moreover, earlier Eighth Circuit decisions allegedly applying the "well-pleaded complaint" rule in the manner now advocated by the petitioner were expressly repudiated by this Court in *Lawrence County, et al. v. Lead-Deadwood School District*, 460 U.S. —, 105 S.Ct. —, 83 L.Ed.2d 635, 640, n.6 (1985).

VI. THE CASE DOES NOT PRESENT A JUSTICIABLE ISSUE WITHIN THE JURISDICTION OF THE COURT.

Under Article III of the Constitution, this Court's jurisdiction is limited to "cases and controversies." To be justiciable within the requirements of Article III, a case must "present a legal and substantial controversy which unequivocally calls for adjudication of the rights" asserted. *Poe v. Ullman*, 367 U.S. 497, 509, 81 S.Ct. 1752, 61 L.Ed.2d 989 (1961) (Brennan, J., concurring). A case which, by the time it reaches this Court has become moot, cannot be considered to present a justiciable issue for purposes of the exercise of Article III jurisdiction. *See, North Carolina v. Rice*, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

On September 5, 1985, after the entry of the Eighth Circuit's opinion, the parties to the AP&L rate proceeding, including AP&L, the Attorney General of Arkansas, the

Commission Staff, the Southern Cotton Ginners Association, Arkansas Electric Energy Consumers and Reynolds Metals Company, entered into a Stipulation and Settlement Agreement. The petitioner was not a party to the rate case and, accordingly, was not a party to the agreement or the settlement negotiations. The agreement, besides settling the AP&L rate case, also represented a settlement of various collateral proceedings which the Grand Gulf controversy had spawned. In particular, it provided that:

> All of the aforementioned parties except AP&L agree to take such action as may be necessary to voluntarily dismiss without prejudice, terminate or withdraw their interventions in the following litigation concerning AP&L to the extent they have the ability to do so.
>
> a. MSE v. APSC, U.S. Court of Appeals for the Eighth Circuit Nos. 84-2409, 84-2410, 84-2480 and 84-2356. . . .
>
> e. APSC Docket No. 84-190-U. *Appendix to Memorandum of APSC, Exhibit B*, pp. 30-31.

On September 9, 1985, the Commission, by Order No. 26 in the AP&L rate case, approved the Stipulation and Settlement Agreement. AP&L implemented rates pursuant thereto immediately after the entry of the final order. On September 20, 1985, the APSC entered an order terminating Docket No. 84-190-U, the show cause proceeding the District Court had enjoined. *Appendix to Brief in Opposition*, Part E. By letter dated September 10, 1985, counsel for the APSC informed the Clerk of the Eighth Circuit that the APSC's petition for rehearing of that court's decision was being withdrawn. *Appendix to Brief in Opposition*, Part F.

The entry of a settlement or consent decree prior to the determination of a case by this Court will render an

otherwise justiciable controversy moot. *Verrot, et al. v. Oil Transport Company, Inc., et al.*, 365 U.S. 768, 81 S.Ct. 911, 6 L.Ed.2d 83 (1961); *J. Aron & Company v. Mississippi Shipping Company, Inc.*, 361 U.S. 115, 80 S.Ct. 212, 4 L.Ed.2d 148 (1959). Although the question of mootness is complicated in this case by the petitioner's efforts to obtain review, for all practical purposes, the case is moot. It must be remembered that the rights the petitioner seeks to vindicate are not its own rights, but are the rights of the State of Arkansas. The APSC and the Attorney General, the only parties below with obvious standing to defend state perogatives, have now agreed to the termination of the show cause proceeding enjoined by the lower courts. The Court should accord little weight to the petition of a private party seeking to represent the "public interest" against the actions of public officials which have the legal obligation to represent that interest.

Although the memorandum filed herein by the APSC did not oppose certiorari, the APSC set forth no grounds which would justify review and stated that "the Commission questions its ability to take a position in support of the granting of the petition," in light of the Stipulation and Settlement Agreement. *Memorandum of APSC*, p. 1. In essence, the APSC's response simply notified the Court that, if certiorari were granted, the APSC would seek to defend its show cause order. The only relevant substantive issue addressed by the APSC was the question of mootness, to which it responded that it did not "believe that all legal issues raised by the petition are moot. . . ." *Memorandum of APSC*, p. 14. The issues which the APSC believes are not moot apparently involve actions which the APSC might take in future proceedings if the Eighth Cir-

cuit's decision were reversed. Questions involving the APSC's possible future conduct, especially in light of the Stipulation and Settlement Agreement were not, however, raised by the decision below and are not before this Court with the degree of specificity or certainty that a case or controversy would require.

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CONCLUSION

For the reasons stated above, certiorari should be denied. A workable *status quo* has been achieved by the principal parties to this litigation which the respondents hope the Court will leave undisturbed. The substantive issues underlying the Grand Gulf controversy can be addressed in an appeal of FERC Opinion No. 234, now under review by the District of Columbia Court of Appeals.

Respectfully submitted,

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PART A

AVAILABILITY AGREEMENT

BETWEEN

MIDDLE SOUTH ENERGY, INC.

AND

ARKANSAS POWER & LIGHT COMPANY, ARKANSAS-MISSOURI POWER COMPANY, LOUISIANA POWER & LIGHT COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, and NEW ORLEANS PUBLIC SERVICE INC.

THIS AGREEMENT, dated as of the 21st day of June, 1974, between Middle South Energy, Inc. (MSEI) and Arkansas Power & Light Company (AP&L), Arkansas-Missouri Power Company (Ark-Mo), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L) and New Orleans Public Service Inc. (NOPSI), Witnesseth That:

Whereas, AP&L, Ark-Mo, LP&L, MP&L and NOPSI (collectively, System operating companies and, singly, System operating company), all outstanding shares of whose common stock are wholly owned by Middle South Utilities, Inc., operate electric generating, transmission and distribution facilities in the states of Arkansas, Louisiana, Mississippi and Missouri and comprise the Middle South System; and

Whereas, the System operating companies are parties to an agreement dated April 16, 1973 (as presently constituted and as amended in the future, System Agreement), which provides the contractual basis for the continued planning, construction and operation of certain fa-

cilities owned by the System operating companies to achieve the purposes set forth therein; and

Whereas, other entities may become parties to the System Agreement; and

Whereas, MSEI has been organized as a subsidiary of Middle South Utilities, Inc. to finance and own certain generating units for the benefit of the Middle South System, including the Grand Gulf Nuclear Electric Station project (Project), a two unit nuclear-fueled electric generating plant having an expected aggregate capacity of 2,500,000 KW and to be located near Port Gibson, Mississippi; and

Whereas, MSEI is, subject to the terms hereof, willing to undertake the construction and operation of the Project, to become a party to the System Agreement and to make available to the Parties, as hereinafter defined, all of the power (and the energy associated therewith) available at any MSEI Generating Unit, including the Project, under the terms hereof and of the System Agreement; and

Whereas, the Parties, as hereinafter defined, are, subject to the terms hereof, willing to purchase power (and the energy associated therewith) available or to be available at any MSEI Generating Unit, including the Project, under the terms hereof and of the System Agreement;

Now, therefore, in consideration of the terms and conditions hereinafter set forth, the parties hereto agree with each other as follows:

1. For the purposes of this Agreement, the following definitions shall apply:

(a) *Party or Parties* shall mean any entity or entities (other than MSEI) now or hereafter a party or parties to this Agreement.

(b) *MSEI Generating Unit* shall be that portion of any electric generator, together with its prime mover and all auxiliary and appurtenant devices and equipment designed to be operated as a unit for the production of electric power and energy and all associated equipment and facilities, which is owned by MSEI and which MSEI and the Parties have designated as being subject to this Agreement.

(c) *Power* shall mean both power and the energy associated therewith, including test power produced during construction or thereafter.

2. MSEI and the Parties hereby designate Unit No. 1 and Unit No. 2 of the Project as being subject to this Agreement and MSEI Generating Units hereunder, and MSEI hereby undertakes to use its best efforts to construct the Project.

3. On or before the date on which Unit No. 1 of the Project is placed in commercial operation, MSEI and the Parties will join in executing such document or documents as may be necessary for MSEI to become a party to the System Agreement. MSEI and the Parties will also join in executing at an appropriate time such document or documents as may be necessary for others who become parties to the System Agreement to join in and become parties to this Agreement. MSEI shall, subject to the provisions of the then applicable requirements of Section 6 of this Agreement and the then applicable provisions of the System Agreement (or any agreement substituted therefor), make available, or cause to be made available, to the Parties all Power available from time to time at any MSEI Generating Unit.

4. The Parties shall, subject to the provisions of the then applicable requirements of Section 7 of this Agreement and the then applicable requirements of the System Agreement (or any agreement substituted therefor) be entitled to receive all Power available from time to time at any MSEI Generating Unit; provided, that (i) should any Party terminate its participation in the System Agreement, then it is agreed that MSEI, such Party and the other Parties shall enter into a separate agreement whereby such Party shall continue to be entitled to receive Power, and obligated to take Power, available at any MSEI Generating Unit which has been designated as being subject to this Agreement at the time such Party shall exercise its right to terminate such participation, in such amounts and for such consideration calculated from time to time as if such Party had remained a party to the System Agreement, and (ii) should the System Agreement be cancelled or terminated then it is agreed that MSEI and all such Parties shall enter into a separate agreement whereby such Parties shall continue to be entitled to receive Power, and obligated to take Power, available at any MSEI Generating Unit which has been designated as being subject to this Agreement at the time of a cancellation or termination of the System Agreement, in such amounts and for such consideration calculated from time to time as if the System Agreement had remained in effect and MSEI and such Parties were parties thereto. Notwithstanding such withdrawal from, or cancellation or termination of, the System Agreement, each Party shall remain bound by the terms of this Agreement with respect to any MSEI Generating Unit which has been designated as being subject to this Agreement at the time of such withdrawal,

cancellation or termination. In consideration of MSEI's commitment to undertake construction of the Project and its other obligations hereunder and of the right of the Parties to receive Power available at any MSEI Generating Unit under the terms of the System Agreement (or any separate agreement referred to above), the Parties agree to pay to MSEI, commencing of the date on which a particular MSEI Generating Unit is deemed to be in operation for the purpose of this Agreement, such amounts from time to time as, when added to amounts received by MSEI from any other source, including, but not limited to, amounts (if any) received by MSEI with respect to such MSEI generating unit under the terms of the system agreement, shall be at least equal to MSEI's total operating expenses and interest charges with respect to such MSEI Generating Unit, including (without limitation), for the purposes of this Agreement, (i) all expenses, deductions, charges and other items properly chargeable to the applicable Income Accounts 400 to 435, inclusive, of the Uniform System of Accounts prescribed by the Federal Power Commission for Class A and Class B Public Utilities and licensees, as in effect on April 1, 1973, (Uniform System of Accounts) or, if such MSEI Generating Unit is not in service for any reason, all expenses, deductions, charges and other items which would be chargeable to the above Accounts if such MSEI Generating Unit were in service; it being agreed that when a particular generating unit is designated as being subject to this Agreement by MSEI and the Parties, then, solely for the purposes of determining MSEI's total operating expenses under this Section 4, such MSEI Generating Unit shall be deemed to be in operation on the date, and the accrual of depreciation as an

operating expense with respect to the MSEI Generating Unit shall be deemed to commence on the date at the rate and in the manner and continue for the duration, as is specified in the document so designating such generating unit as a MSEI Generating Unit subject to this Agreement, whether or not such MSEI Generating Unit is actually in operation on such date, and (ii) such expenses as might be incurred in connection with permanent shut-down of any MSEI Generating Unit which is nuclear-fueled and, in the event of any such shut-down, for perpetual maintenance and surveillance of any such facility in accordance with and as required by, all applicable regulations established by any governmental authority having jurisdiction. Payments to be made pursuant to this Section 4 shall be made monthly and shall be apportioned among the Parties whose Company Capability is less than its Capability Responsibility, as such terms are defined in the System Agreement and as determined in accordance with Section 10 of the System Agreement, in the ratio of each such Party's deficiency to the sum of the deficiencies of all such deficient Parties; provided, however, that if in any month no Party has such a deficiency then the payments for such month shall be apportioned among the Parties in accordance with the ratio of their then respective Capability Responsibilities, as such term is defined in the System Agreement. For the purpose of this Agreement, the Capability of all MSEI Generating Units shall be included in the System Capability, as such terms are defined in the System Agreement. In the event the System Agreement is not then in effect, or has been amended or interpreted so that at least one or more of the Parties is not obligated to make the entire pay-

ment herein provided, then the Parties agree to make payments hereunder in accordance with the ratio of their then respective "Capability Responsibilities", as such term is defined in Appendix A attached hereto and made a part hereof and not as defined in the System Agreement. Payments made by any Party to MSEI pursuant to this Section 4 shall be applied as a credit to such Party's liability for payments to MSEI under the System Agreement.

5. For the purpose of determining MSEI's expenses and the Parties' obligations under Section 4 of this Agreement, it is hereby agreed that both Unit No. 1 and Unit No. 2 of the Project shall be deemed to be in operation on the earlier of December 31, 1982 (whether or not such Units, or either of them, are then completed or in operation) or the date on which either of such Units is first place in commercial operation as determined under the System Agreement (or any agreement substitute therefor), and the accrual of depreciation and amortization with respect to the Project shall be deemed to commence on the earlier of such dates; that such accrual of depreciation and amortization shall be at the rate of 3.65% per annum of the aggregate amount properly chargeable (prior to the deduction therefrom of any depreciation or amortization) at the time with respect to the Project to Balance Sheet Accounts 101, 102, 103, 104, 105, 106, 107 (the aforementioned accounts being exclusive of land and land rights), 118, 120 (.1 through .5), 121, 123, 123.1, 124, 151, 152, 153, 154, 155, 156, 157, 163, 182, 183, 184, 185, 186, 187 and 188 of the Uniform System of Accounts and such other accounts as are properly subject to depreciation or amortization at the time pursuant to such Uniform System of Ac-

counts; and that such accrual shall continue during each of the first 27+ years after the date of commencement of such accrual hereunder whether or not such Units, or either of them, shall ever commence operation and/or remain in operation; provided, however, that if Unit No. 1 is placed in commercial operation prior to December 31, 1982 and Unit No. 2 is not completed and ready for service at such time, then until December 31, 1982 or the date Unit No. 2 is placed in commercial operation, whichever date occurs earlier, expenditures included in Account 107 which are identified exclusively with the construction of Unit No. 2 may be excluded from the calculation of the aggregate amount subject to the accrual of depreciation and amortization pursuant to this paragraph.

6. The performance of the obligations of MSEI hereunder shall be subject to the receipt and continued effectiveness of all authorizations of governmental regulatory authorities at the time necessary to permit MSEI to perform its duties and obligations hereunder including the receipt and continued effectiveness of all authorizations by governmental regulatory authorities at the time necessary to permit MSEI to finance, to construct or cause to be constructed, to operate or cause to be operated, and/or to make available to the Parties the Power available at any MSEI Generating Unit. MSEI shall use its best efforts to secure and maintain all such authorizations by governmental regulatory authorities.

7. The performance by each Party of its obligations hereunder shall be subject to the receipt and continued effectiveness of all authorizations of governmental regulatory authorities necessary at the time to permit it to perform its duties and obligations hereunder, including

the receipt and continued effectiveness of all authorizations by governmental regulatory authorities necessary at the time to permit it to pay to MSEI, in consideration for the right to receive its share of the Power available at any MSEI Generating Unit, the amounts provided for in Section 4 of this Agreement. Each Party shall use its best efforts to secure and maintain all such authorizations by governmental regulatory authorities. Each Party shall, to the extent permitted by law, be obligated to perform its duties and obligations hereunder, subject to the then applicable provisions of this Section 7, (a) whether or not MSEI shall have received all authorizations of governmental regulatory authorities necessary to permit MSEI to perform its duties and obligations hereunder or under the System Agreement, (b) whether or not such authorizations, or any such authorization, shall at any time in question be in effect, (c) whether or not the System Agreement shall, from time to time, be amended, modified or supplemented or shall be cancelled or terminated or such Party shall have withdrawn therefrom and (d) so long as MSEI and such Party shall continue to be subsidiary companies of Middle South Utilities, Inc. (as said term is defined in Section 2(a)(8) of the Public Utility Holding Company Act of 1935) or a successor thereto, whether or not, at any time in question, MSEI shall have performed its duties and obligations under this Agreement or the System Agreement. In the event that MSEI or any Party shall cease to be such a subsidiary company, then and thereafter such Party shall not be relieved of its obligation to make payments pursuant to Section 4 of this Agreement by reason of the failure of MSEI to perform its duties and obligations hereunder or under the System Agreement

occasioned by act of God, fire, flood, explosion, strike, civil or military authority, insurrection, riot, act of the elements, failure of equipment, or for any other cause beyond the control of MSEI.

8. To the extent they may legally do so, each Party and MSEI hereby irrevocably waive any defense based on the adequacy of a remedy at law which may be asserted as a bar to the remedy of specific performance in any action brought against it for specific performance of this Agreement by any other party to this Agreement, or by a trustee under any mortgage or other debt instrument which any such party to this Agreement may, subject to requisite regulatory authority, enter into, or by any receiver or trustee appointed for any such party under the bankruptcy or involvency laws of any jurisdiction to which any such party may be subject; provided, however, that nothing herein contained shall be deemed to constitute a representation or warranty by any party to this Agreement that their respective obligations under this Agreement are, as a matter of law, subject to the equitable remedy of specific performance.

9. No Party shall be entitled to set off against any payment required to be made by such Party under this Agreement (i) any amounts owed by MSEI to such Party or (ii) the amount of any claim by such Party against MSEI. The foregoing, however, shall not affect in any other way the rights and remedies of any Party with respect to any such amounts owed to such Party by MSEI or any such claim by such party against MSEI.

10. The invalidity or unenforceability of any provision of this Agreement shall not affect the remaining provisions hereof.

11. This Agreement shall become effective forthwith. This Agreement may be amended, modified or terminated only with the consent of MSEI and of the Parties then having responsibility for two-thirds or more of the amounts to be paid under Section 4 hereof, and upon the receipt and continued effectiveness of all authorizations of governmental regulatory authorities at the time necessary.

12. This Agreement shall be binding upon the Parties and MSEI and their respective successors and assigns, but no assignment hereof, or of any right to any funds due or to become due under this Agreement, shall in any event relieve any Party or MSEI of any of their respective obligations hereunder, or, in the case of the Parties, reduce to any extent their entitlement to receive Power available from time to time at any MSEI Generating Unit.

13. The agreements herein set forth have been made for the benefit of the Parties, MSEI and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed by their respective officers thereunto duly authorized as of the day and year first above written.

Arkansas Power & Light Company

Witness:

James A. Brignac

By Reeves E. Ritchie
President

Arkansas-Missouri Power Company

Witness:

Cheryl B. Young

By F. G. Smith
President

Witness:
Stephanie T. Tzamonte

Louisiana Power & Light Company
By E. A. Rodrigue
President

Mississippi Power & Light Company
By D. C. Lutken
President

Witness:
J. B. Ballinger

New Orleans Public Service Inc.
By William McCollam, Jr.
President

Witness:
Barbara Plaisance

Middle South Energy, Inc.
By F. W. Lewis
President

Witness:
J. E. Ammon

APPENDIX A

Definition of "Capability Responsibility"
As Used in Availability Agreement

"Capability Responsibility" shall mean: with respect to any "Company", the System Capability" multiplied by the "Responsibility Ratio" for that Company.

"Company" shall mean one of the Middle South Utilities, Inc.'s System operating companies, as defined in the Availability Agreement; "System Capability" shall mean the arithmetical sum in megawatts of the individual "Company Capabilities" shall be the net output in megawatts that can be produced by all of a Company's generating units, each unit of which consists of an electric generator, together with its prime mover and all auxiliary and appurtenant devices and equipment designed to be operated as a unit for the production of electric power and energy, under the conditions specified by the administrative organization then having the authority to so specify, under either the System Agreement or any similar and succeeding agreement to which such Company is a

party, or the input in megawatts available under contract to such Company from a supplying source; provided, however, that each Company shall be deemed to have at least one Kilowatt of Capability, whether or not it has any such Capability; "Responsibility Ratio" shall mean the ratio obtained by dividing a "Company Load Responsibility" by the "System Load Responsibility"; "Company Load Responsibility" shall mean (a) the average of the four highest clock-hour demands in megawatts of a Company's system, each on a different day, occurring during the twelve month period ending with the current month, but not less than 90% of the average of the four highest such demands occurring during the twenty-four (24) month period ending with the current month, where each such demand shall represent the simultaneous hourly input from all sources into the system of a company, less the sum of the simultaneous hourly outputs to the system of other interconnected utilities (Company demands shall include firm power supplied to other systems for its own account), (b) less the power supplied to others as sales for the joint account of all Companies, (c) less the contractual amount of firm purchases with reserves available during the month from other systems for its own account; provided, however, that each Company shall be deemed to have a Load Responsibility of at least one kilowatt, whether or not such Company has any such Load Responsibility; "System Load Responsibility" shall be the arithmetical sum in megawatts of the individual Company Load Responsibilities.

PART B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

PUBLIC UTILITY HOLDING COMPANY ACT of 1935

Release No. 23579 / January 23, 1985

In the Matter of

MIDDLE SOUTH UTILITIES, INC.
MIDDLE SOUTH ENERGY, INC.
New Orleans, Louisiana

File Nos. 70-6906, 70-7021 and 70-7026

MEMORANDUM OPINION AND ORDER AUTHORIZING COMMON STOCK SALE AND ACQUISITION AND DENYING REQUEST FOR HEARING

AND

SUPPLEMENTAL MEMORANDUM IN CONNECTION WITH BOND FINANCINGS

Middle South Utilities, Inc. ("MSU"), a registered holding company, proposes to purchase and Middle South Energy, Inc., ("MSE") its subsidiary, proposes to issue and sell, at $1,000 per share, up to 160,000 common shares ($160 million) on or before July 31, 1985, all pursuant to Sections 7, 10 and other applicable provisions of the Public Utility Holding Act of 1935 ("Act"). MSU is MSE's sole stockholder, owning on September 30, 1984, $789.35 million, in common stock, all issued for cash in $1,000 shares. The proposed transactions would increase MSU's investment to $963.6 million.[1] Due notice was published

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[1] That includes $14.25 million balance of a prior authorization. *Middle South Utilities, Inc., et al.*, HCAR No. 23259 (March 23, 1984).

(HCAR No. 23413, September 6, 1984). The Arkansas Public Service Commission, ("Arkansas Commission") has intervened and requested a hearing. MSU and MSE filed a response, and the Arkansas Commission filed a reply.

1. *Organization and Capital Structure*

MSE, an Arkansas corporation, was organized in 1974 to own and finance the Grand Gulf nuclear generating project, at Port Gibson, Mississippi.[2] The plant is designed to be connected to the integrated electric transmission network of the Middle South system, which interconnects four electric utility subsidiaries of MSU, serving western Mississippi, Louisiana and Arkansas.[3] MPL had transferred to MSE the Grand Gulf project, but MPL is constructing the plant as MSE's agent, and is expected to operate the facility in the same capacity. South Mississippi Electric Power Association, a non affiliate, owns 10% of the project.

The Nuclear Regulatory Commission ("NRC") approved the Grand Gulf operating license for Unit 1 on July 31, 1984, which was issued the following month.[4] MSE has

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[2] *Middle South Utilities, Inc., et al.*, HCAR No. 18437 (June 4, 1974).

[3] Mississippi Power & Light Company ("MPL"), Louisiana Power & Light Company ("LPL"), New Orleans Public Service, Inc. ("NOPSI"), Arkansas Power & Light Company ("APL"). Arkansas Missouri Power Company, another subsidiary utility company, was consolidated with AP&L, *Middle South Utilities, Inc., et al.*, HCAR No. 21873 (December 31, 1980)

[4] NRC reissued the license November 1, 1984. A petition for review was filed October 1, 1984 in the United States Court of Appeals, District of Columbia Circuit, by Jacksonians United for Livable Energy Policies and is pending.

obtained extensions of dates required by its loan agreements for commercial operation of Unit 1 and deferrals of principal payments and related obligations. It currently expects to begin commercial operations in the first quarter of 1985.

On September 30, 1984, MSE had invested $3.7 billion in the project, of which $1.4 billion was allowance for funds used during construction ("AFUDC"), that is, tax adjusted interest expense and an allowance for return on equity during the construction period. Unit 1, a 1250 MW generating plant, represents a cost of $2.9 billion, and Unit 2, considered 34% complete, $.08 billion. Continued accrual of AFUDC and other capitalized expenses are expected to increase the cost of Unit 1 to about $3.1 billion by March 1985.

MSE has borrowed about $2.5 billion, of which $2.1 billion is construction financing under two bank loan agreements. We have authorized it to issue up to $250 million in pollution control financing and $400 million in first mortgage bonds. Our opinion on the bonds described more fully MSE's September 30, 1984 balance sheet and indebtedness.[5] The refunding therein referred to includes about $100 million of accrued interest on outstanding debt.[6] MSE

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5 *Middle South Energy Inc., et al.*, HCAR No. 23495 (November 23, 1984) and HCAR No. 23526 (December 12, 1984). For the terms of the sale see: HCAR Nos. 23545 (December 26, 1984) and 23546 (December 26, 1984), supplemented by HCAR No. 23555 (December 28, 1984).

6 Its interest expense for the 12 months ended September 30, 1984 was $331 million and $84 million had accrued on that date. Most of its debt provides for semi-annual interest payments, principally in January and February and July and August.

will have no revenues until Unit 1 is in service. MSE sharply curtailed construction on Unit 2 in 1979 and has, since 1983, devoted its resources to the completion of Unit 1.[7] The Mississippi Public Service Commission, which issued the certificate of public convenience and necessity for the project, has issued an order to show cause as to the continued construction and need for Unit 2.[8]

2. *MSE Financing and Related or Supporting Agreements*

The financing of MSE is supported by two agreements, dated June 21, 1974, one of which is the capital funds agreement between MSE and MSU. It obligates MSU to purchase MSE common stock as needed to maintain a common equity of at least 35% and provide such amounts as shall be required, in addition to MSE's other sources of funds, for construction, pre-operating expenses and interest on the project, to permit continuance of its operation, and to pay maturing MSE debt. The present proposal is the latest in a series of common stock sales to MSU previously authorized by orders under Section 6(a) and 7 of the Act.[9]

This Commission's order, issued on June 4, 1974, authorized the capital funds agreement and other transactions, including an availability agreement between MSE and the

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7 Interest payments, of course, are applicable to both units and MSE must protect and maintain its property.

8 *Mississippi Public Service Commission,* Docket No. U-4387.

9 *Middle South Utilities, et al.* HCAR Nos. 23259 (March 23, 1984); 23117 (November 29, 1982); 22555 (June 29, 1982); 22161 (August 14, 1981); 21754 (October 21, 1980); 21429 (February 12, 1980); 20327 (December 20, 1977); 20209 (October 12, 1977); 19836 (December 30, 1976).

associate electric utility companies.[10] MSE agreed to complete the Grand Gulf units, and to make available to the other subsidiary utilities the power generated by Grand Gulf. For all of which, these participating utilities agreed, severally and not jointly, to indemnify MSE, commencing not later than December 31, 1982, against loss by paying such amounts as, when added to other MSE revenues, would meet MSE's operating expenses, including depreciation at 3.65%, and interest. The original availability agreement provided that availability obligations would be allocated monthly among the operating companies in proportion to reserves or deficiencies as defined in the system agreement.

The operating subsidiaries in the Middle South system have been an integrated system since 1930.[11] As an integrated system, the operating companies have been parties to a series of system agreements governing intercompany sales of electric energy, as well as the planning, construction and operation of generation and transmission facilities. These agreements are regulated by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act. The availability agreement contemplated that MSE would become a party to the system agreement when it commenced selling electric energy, but provided for alternatives. The parties, in 1982, formalized that understanding by signing a unit power sales contract with MSE, and also amended the system agreement, both

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10 *Middle South Utilities, Inc., et al.* HCAR No. 18437 (June 4, 1974).

11 *Electric Power & Light Corp. et al.*, 29 SEC 52, 63 (1949).

of which were filed with FERC and are related to the pending proceedings.

Both the capital funds agreement and the availability agreement have been assigned by MSE to secure bank loans, mortgage bonds and pollution control financing. In each case the operating utility companies executed consents to the assignments.

Our order of June 22, 1981, authorized additional financing for Grand Gulf and amendments to the availability agreement.[12] As then amended, the availaiblity agreement provided for the intended allocation of MSE's share of the power and energy from Grand Gulf and the indemnity obligations in stated percentages: APL—17.1%, LPL—26.9%, MPL—31.3%, NOPSI—24.7%.

It later appeared, on the basis of new forecasts, that APL would not need Grand Gulf energy, and on November 18, 1981, we approved further amendments to the availability agreement which relieved APL of its obligations for power and energy from both units as well as the indemnity obligations, as follows:

		Amendment 1	Amendment 2
	(Both Units)	Unit 1	Unit 2
APL	17.1	—0—	—0—
LPL	26.9	38.57	26.23
MPL	31.3	31.63	43.97
NOPSI	24.7	29.80	29.80

As the banks and other lenders did not join in this amendment, APL remains obligated under the availability agree-

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12 *Middle South Energy, Inc., et al.*, HCAR No. 22098 (June 22, 1981).

ment, but LPL, MPL and NOPSI have agreed to indemnify APL for its obligations in proportion of their allocated capability and energy of Grand Gulf units.[13].

In the amendment to the availability agreement of June, 1981, the date for commencement of the indemnity payments was deferred. The operating utility companies—LPL, MPL, and NOPSI—agreed instead to commence on January 2, 1984, to make advance payments for power at the rate of $12.5 million per month, or $150 million per year. These payments will continue until commercial operations of Unit 1 or December 31, 1985, whichever occurs sooner. Thereafter, if Unit 1 is not in operation, deficiencies in revenues, as defined, will be governed by the amended availability agreement, under which APL has been effectively excluded.

On June 10, 1982, MSE, MPL, LPL and NOPSI, but not APL, entered into a unit power sales agreement. MSE agreed to sell all of the capacity and energy available to it from Grand Gulf to the three operating utilities in accordance with the percentages specified in the availability agreement as last amended in November 1981. Charges for this unit energy are to be computed monthly on the basis of MSE's total cost of service. The agreement was filed with FERC and hearings were held before an Administrative Law Judge.

The initial decision upheld the original proposal in many respects.[14] It recommended that MSE be granted a 16.04%

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13 *Middle South Energy, Inc., et al.*, HCAR No. 22280 (November 18, 1981).

14 *Middle South Energy, Inc.*, Docket No. ER-82-616-000. The initial decision was rendered on February 3, 1984, 26 FERC 166,044.

rate of return on common equity rather than 18% proposed by MSE and that its method of proposed depreciation be approved. There was sharp disagreement on the proposed allocation of capacity and energy. APL and the Arkansas Commission, among others, urged approval of the allocations as initially filed. The initial decision accepted a proposal of the Louisiana Public Service Commission to allocate energy from unit one of Grand Gulf as follows: APL—36%, LPL—14%, MPL—33%, NOPSI—17%. It found that the failure to allocate any portion of Grand Gulf power and costs to APL grants an undue preference to APL and unduly discriminates against the other operating companies and their customers in the Middle South system, contrary to Section 206 of the Federal Power Act. APL and the Arkansas Commission have filed exceptions and appealed to the full Commission, and the case is still pending.

3. *Discussion of Issues*

The issue and sale of common stock by MSE is subject to Section 7,[15] subsection (g) of which requires compliance with state laws.[16] The acquisition of the stock by MSU re-

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[15] The jurisdiction of this Commission with respect to the availability agreement existed under Section 12(b) of the Act as to the indemnity obligations of the four operating companies to MSE and as to the indemnity that three of the companies gave to APL. The contracts for the sale of electric energy among the subsidiaries of MSE are subject to the exclusive jurisdiction of FERC. Generally a contract for sale of goods and services to an associate company is governed by Section 13(b) of the Act, but Section 2(a)(20), which defines "Sales contract," expressly excludes sale of "electric energy or natural or manufactured gas."

[16] Section 7(g) provides that if a State commission having jurisdiction over the securities of the issuing companies

(Continued on following page)

quires approval under Section 10, and subsection (f) thereof also requires compliance with applicable state laws.[17] Neither the sale nor the acquisition in this case is subject to approval by the Arkansas Commission. MSU is a holding company, and all of the property of MSE is in Mississippi. Neither is subject to the public utility laws of Arkansas.[18]

Since the Arkansas Commission has no jurisdiction over MSE's sale and issuance of its common stock, Section 7(g) of the Act does not operate to prohibit this Commission from allowing the declaration to become effective. Thus, this Commission may proceed to consider whether the proposed common stock sale is necessary or appropriate in the public interest or for the protection of investors or consumers.

The Arkansas Commission's objection is related to the availability agreement of 1974 and as amended in 1981. It claims that the indemnity obligation of APL under that agreement is or may be an "evidence of indebtedness" un-

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(Continued from previous page)

informs this Commission that state laws have not been complied with in respect to the issuance of the securities, this Commission "shall not permit a declaration . . . to become effective until and unless the Commission is satisfied that such compliance has been effected."

17 Section 10(f) provides that the Commission shall not approve an acquisition unless it appears to the Commission "that such State laws as may apply in respect to such acquisition have been complied with . . ."

18 The Arkansas Attorney General admits that the Arkansas Commission has no jurisdiction over MSE's stock issuances. *See Brief of the State of Arkansas in Support of its Motion to Dismiss*, at 14.

der Arkansas law, which requires approval of the Arkansas Commission, and that without its approval APL's obligation is void.[19] The Arkansas Commission did not intervene in the 1974 and 1981 proceedings.

The short and simple answer is that the indemnity obligations in the availability agreement do not extend to the common stock which MSU now owns or proposes to buy from MSE. Moreover, the assignment of the availability agreement in connection with the bond issuances does not constitute an issuance or sale by APL of a security and therefore does not grant the Arkansas Commission the type of jurisdiction prerequisite to Section 7(g).

Our approval of the availability agreement, and the amendments in 1981, did not mean that Arkansas state law was preempted. Section 21 declares that nothing in the Act shall affect the jurisdiction of any other commission over "any person, security, or contract . . ." so long as such jurisdiction is not in conflict with the Act, or rule or order thereunder. The authorization of the availability agreement in 1974 and the amendments in 1981 determined only that Federal requirements under the Act have been met.

That, it seems, was understood by the Arkansas Commission. On August 1, 1984, the Arkansas Commission issued an order to show cause, returnable August 31, why APL's obligations "should not be held to be void *ab initio* as a

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[19] The Arkansas statute provides that a public utility may not " . . . issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than thirty-six (36) months . . . " without authorization of the Arkansas Commission. Ark. Stat. Ann. § 73-255 (1983 Cumm. Supp.).

matter of law."[20] Its order referred to all contractual obligations affecting APL, including the availability agreement previously described.

MSE and APL filed suit for permanent injunction against the Arkansas Commission, and after a hearing upon extensive briefs the federal district court, on September 14, 1984, issued its Memorandum Opinion and Judgment permanently enjoining the Arkansas Commission from further proceeding under its order to show cause.[21] The federal court held that the Arkansas Commission had no authority to inquire into the agreements with MSE because they relate to the sale and purchase of wholesale power within the exclusive jurisdiction of FERC.

The Arkansas Commission states that until the injunction of the federal court is dissolved, it lacks an alternative forum, except under the Act, in which to assert its interest. The Arkansas Commission may appeal and reinstate its own proceeding that is now enjoined, and, we are informed, it has appealed. The Arkansas Commission is assured under Section 21 that neither the order in this case authorizing the sale and purchase of the MSE common stock, nor the authorizations of the bond financings supersede requirements of state laws as they may eventually be established in respect to APL's commitments in the financing of the Grand Gulf project.

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20 *In the Matter of an Order for Arkansas Power & Light Company, etc.*, Docket No. 84-190-U, Order No. 1, page 6.

21 *Middle South Energy, Inc., and Arkansas Power & Light Co. v. Arkansas Public Service Commission, et al.*, No. LR-C-84-778 (E.D. Ark. 1984).

The Arkansas Commission now claims that the obligations of APL under the availability agreement are subject to Section 7(g). It assumes that the assignment of APL's indemnity involves an issuance or sale of a "security" under Section 6(a) of the Act.[22]

The contractual arrangement to which the Arkansas Commission objects was entered into in 1974 and amended in 1981. In each of those instances this Commission reviewed the agreement under the Act. The Arkansas Commission had the opportunity to seek to intervene in all proceedings but did not. At this time that contractual agreement is not before this Commission. Instead the Commission is reviewing transactions in connection with which MSE has assigned its rights under the availability agreement.

These two contractual arrangements, though related, must be distinguished. There are first the indemnity commitments to MSE under the availability agreement by the four operating utilities. The other is the assignment by MSE of the availability agreement as a security interest for its debts. The indemnity commitments obligate the operating utilities for MSE's revenue deficiencies to cover its expenses, depreciation and interest, and the assignment transfers the right to receive the indemnity payments for which the operating utilities are already obligated. As to MSE's issuance of the two types of bonds, the assignment does not alter the character of APL's ob-

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[22] We do not decide whether or not the APL's indemnity constitutes a "security" in this case. As discussed below, even if the indemnification constitutes a security for purposes of Sections 6 and 7, there has been no issuance or sale in these transactions, only an assignment by MSE of its rights as indemnitees.

ligation nor the indemnity undertaking that LPL, MPL and NOPSI have given to APL. The assignment creates no new obligation for APL, and the consent by APL to MSE's assignment does not involve the issuance or sale of a security by APL.

If APL's indemnity constitutes a security for purposes of the Holding Company Act, the issuance of the security occurred upon the execution of the availability agreement. At that time the extent of APL's potential liability was uncertain. However, it is clear that the parties fully recognized that MSE would borrow construction and operating funds in the future. The transactions discussed here are only the realization of the parties' expectations.

Since the Arkansas Commission's jurisdiction extends only to APL and APL did not issue securities in connection with the sale of the pollution control and first mortgage bonds, the Arkansas Commission could not invoke 7(g) to prohibit the Commission from considering those declarations.

Finally, it is not expected that this Commission decide in each case what is required to comply with state laws under Section 7(g) in case of financings. An authorization that does not prejudice the State commission's authority under state law, as we said in connection with MSE's first mortgage bonds, "is sufficient assurance of compliance with any applicable state law."[23]

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23 *Middle South Energy, Inc.*, HCAR No. 23526 (December 12, 1984); *Middle South Utilities, Inc., et al.*, HCAR No. 23495 (November 23, 1984).

MSE denies that authorization by the Arkansas Commission is required and the Federal court has enjoined the Arkansas Commission from holding hearings under its order to show cause. In effect, the Arkansas Commission requests a stay of all financing authorizations by us until the issues regarding state law are resolved.

The probable outcome of the litigation over the applicability of Arkansas law and the constitutional issue that has developed is uncertain. But the effect upon MSU, MSE and its associate companies that are committed to Grand Gulf is not a matter of surmise.

Unit No. 1 is completed and is expected to be in service early in 1985. About $3 billion has been spent on its construction. MSU has supplied about $790 million in equity. MSE debt obligations have to be met, and the proposed mortgage and equity financings are necessary to reduce outstanding debt to maintain or renew lines of credit with the banks. APL has to date provided no capital funds, and the three other operating utilities have agreed to indemnify APL for any liabilities under the availability agreement. APL and the Arkansas Commission have appealed to FERC to reinstate the initial unit power sales agreement, under which APL would not be obligated to purchase any power from Grand Gulf. It is even probable that if it succeeds at FERC, and in view of the indemnity to APL by the three other operating companies, the Arkansas Commission would not pursue the issues regarding the applicability of Arkansas law.

The Arkansas Commission raises or suggests a broad range of other questions that are inconsequential, irrelevant or beyond our authority under the Act. Construction

of a nuclear power plant involves several agencies. MSE, as a Mississippi utility, holds a certificate of convenience and necessity from the Mississippi Commission. It has been granted an operating permit by NRC. It will sell its energy at wholesale, so that its rates are subject to FERC under the Federal Power Act. Our authority is limited to the financing and refunding aspects of the project.

The Arkansas Commission suggests that a hearing it requests we should consider discontinuance or moth-balling of the project. It overlooks, as has been decided several times, that we have no authority to review the construction of generating facilities of the holding-company system or which facilities should be built, abandoned or deferred.[24] We note also that to pospone construction or to leave the facilities idle would not relieve MSE of its obligations on borrowed funds, or MSU under the capital funds agreement, or the operating utilities of their obligations under the availability agreement. Any delay in commercial operation would increase costs by about $28 million per month primarily as a result of finance charges.

The Arkansas Commission suggests, as an alternative, that Grand Gulf be financed as a facility under direct ownership of the operating companies. That is a form of ownership permitted under the Act, as are other variants, including the present arrangement. The choice is essen-

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[24] *The Southern Company*, HCAR No. 21766 (October 29, 1980), *aff'd*, without opinion, *sub nom. Herring v. SEC*, 672 F.2d 894 (D.C. Cir. 1981); *Georgia Power Company*, HCAR No. 21737 (October 1, 1980), *aff'd, sub nom. Herring v. SEC*, 673 F.2d 1191 (11th Cir. 1982); *Alabama Power Company*, HCAR No. 21711 (September 10, 1980); *The Southern Company, et al.*, HCAR No. 21665 (July 24, 1980); *Georgia Power Company*, HCAR No. 23330 (June 15, 1984).

tially management's. Grand Gulf, originally a project of MPL, was transferred to MSE in 1974, and has been financed on that basis. Ownership and organization cannot be altered without refunding some $2.5 billion of outstanding debt. Any change in existing ownership and debt refunding will require our approval and that of several other agencies, including State commissions. Now is hardly the time to consider such far-reaching proposals. MSU and the other companies that want to complete Grand Gulf are content with the decision made ten years ago, and it has not been without advantage to the participating utilities. The entire risk of 35% capital investment is upon MSU. The operating utilities have not been required to provide any capital and, because of the indemnity arrangements, APL has provided no funds either as capital or for debt service.

Finally, the Arkansas Commission suggests that a hearing under Section 7(d) is needed to explore the proposed common stock and debt financings in terms of MSE's earning power.[25] Obviously, a company organized to construct a generating plant has no revenues or income. The financing of construction necessarily depends on committing the credit of the sponsoring or supporting utilities. Stock subscriptions, guarantees and unconditional long-term contracts assuring payment of full cost regardless of energy output have provided the necessary credit for a project company that has no income of its own during construc-

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[25] Section 7(d)(2) provides that we not authorize a proposed financing that is not reasonably adapted to the earning power of the issuer.

tion.[26] In this case, MSE's financial support is based on the capital funds agreement with MSU, the availability agreement, advances for purchase power and the unit power sales contract now before FERC.

In our prior orders in connection with the first mortgage bonds and pollution control bonds (HCAR Nos. 23526 (December 12, 1984) and 23495 (November 23, 1984)), we stated that a supplemental opinion will address in detail all the Arkansas Commission's objections. The foregoing discussion is to be considered the supplemental opinion for each of these financing orders.

On December 21, 1984, the State of Arkansas, through its Attorney General, filed its appearance in this proceeding, a motion to dismiss and supporting brief. It is urged that the indemnity obligation of APL is an evidence of indebtedness which requires approval of the Arkansas Commission; and that, as no such approval has been obtained, the application-declaration in respect of the common stock financing (File No. 70-6906) be dismissed in light of Section 7(g) of the Act. A separate motion is made on essentially the same grounds to reconsider and not to per-

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26 *The Potomac Edison Company*, HCAR No. 17054 (March 17, 1971); *Indiana and Michigan Power Co.*, HCAR No. 17247 (August 23, 1971); *Maine Yankee Atomic Power Co.*, 43 SEC 764, 766-767 (1968); *Vermont Yankee Nuclear Power Corp.*, 43 SEC 693, 695-696 (1968); *Connecticut Yankee Atomic Power Co.*, 41 SEC 715-716 (1963); *Yankee Atomic Electric Corp., et al.*, 36 SEC 552, 558-559 (1955); *Electric Energy Inc. et al.*, 32 SEC 495, 496-498 (1951); *Virginia Public Service Generating Co.*, 6 SEC 419, 423-424 (1939); *Dresser Power Corp. et al.*, 6 SEC 38, 41-42 (1939) in which a contract to lease or purchase the property on completion was used instead of a contract to purchase its output.

mit the sale of first mortgage bonds of MSE (File No. 70-7021), which we authorize by order of December 12, 1984 (HCAR No. 23526). A similar motion for reconsideration and hearing was filed on the same day by the Arkansas Commission. All these motions present no new issues.

There are no genuine or relevant issues of fact, and a hearing is not needed and will be denied.[27] The issue and sale of MSE stock to MSU meets all the standards of the Act.

> IT IS ORDERED, accordingly, that the proposal of MSE to sell common stock and the acquisition thereof by MSU are granted, effective forthwith, subject to Rule 24 under the Act; and
>
> IT IS FURTHER ORDERED that the request for a hearing be, and it hereby is, denied, and
>
> IT IS FURTHER ORDERED that the motion of the State of Arkansas, by its Attorney General, to dismiss the proposal to sell the MSE common stock to to MSU be, and it hereby is, denied; and
>
> IT IS FURTHER ORDERED that the motions to reconsider our prior authorization of MSE's first

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[27] *See Herring v. SEC*, 673 F.2d 1191, 1192-93 (11th Cir. 1982); *The Southern Company*, HCAR No. 21766, 21 SEC Docket 380 (October 29, 1980); *aff'd without opinion, Herring v. SEC*, 672 F.2d 894 (D.C. Cir. 1981); *Assoc. of Mass. Consumers, Inc. v. SEC*, 516 F.2d 711, 714-16 (D.C. Cir. 1975); *Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250, 1267-68 (3rd Cir. 1974); *See also Gulf States Utilities Company v. FPC*, 411 U.S. 747, 754-55 (1973); *City of Lafayette La. v. SEC*, 454 F.2d 941, 954-56 (D.C. Cir. 1971).

mortgage bond financing be, and they hereby are, denied."

By the Commission.

/s/ John Wheeler
Secretary

PART C

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

DOCKET NO. 84-040-0II

ORDER NO. 1

IN THE MATTER OF AN INVESTIGATION INTO THE OPERATION OF ARKANSAS POWER & LIGHT COMPANY AS A SUBSIDIARY OF MIDDLE SOUTH UTILITIES, INC.

ORDER INSTITUTING INVESTIGATION

As the result of recent developments in two proceedings now pending before the Federal Energy Regulatory Commission (FERC)* which portend catastrophically enormous rate increases for all classes of customers of Arkansas Power & Light Company (AP&L), the Arkansas Public Service Commission has determined that it should conduct an investigation into the facts, law, and circumstances underlying the relationships between AP&L, its affiliates, and its parent holding company, Middle South Utilities, Inc. Such an investigation is necessary in order to gauge the effect such intercorporate relationships have had or may have upon the rates charged AP&L's customers and upon the authority and ability of the State of Arkansas, and this Commission in particular, to set retail electric rates for AP&L.

More specifically, the purpose of the investigation hereby instituted is to make findings of fact concerning:

(1) The events leading up to the construction of the Grand Gulf Nuclear Project in the State of Mississippi.

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*Middle South Energy, Inc., FERC Docket No. ER82-616-000, hereafter referred to as the Grand Gulf case, and Middle South Services, Inc., FERC Docket No. ER82-483-000, hereafter referred to as the System Agreement case.

(2) The various agreements and contracts signed by AP&L and other Middle South subsidiaries affecting the planning, construction and financing of, and the obligations of certain companies to pay for, the Grand Gulf plant.

(3) The overall System Agreement signed by the Middle South operating companies in 1973 and all predecessor and successor agreements among the parties to the Middle South power pool.

(4) The representations made to this Commission and other regulatory bodies at various times and in certain proceedings by AP&L and Middle South Utilities, Inc. (including its subsidiaries), concerning the aforementioned events, relationships, agreements, and contracts.

In conducting this investigation, the Commission wishes to enlist the assistance and cooperation of all interested persons having knowledge of facts, events, and circumstances pertinent to the inquiry. Thus, while the general nature of the investigation shall be as stated above, the Commission invites preliminary comments from the public concerning the particular questions which should be addressed in the investigation. All preliminary comments should be received by the Commission no later than Monday, April 2, 1984. Such preliminary comments may be submitted informally, in writing, in the form of statements or letters to the Secretary of the Commission.

After reviewing the preliminary comments, the Commission will issue an Order more specifically focusing the investigation, posing questions, and requesting information. At that time a schedule for the filing of testimony

and/or responses by AP&L and other interested persons will be established. A hearing in this docket shall be held at 9:00 A.M. on Tuesday, May 5, 1984, in the Commission Hearing Room on the First Floor of the new Public Service Commission Building, 10th & Center Streets, Little Rock, Arkansas.

As should be apparent, this investigation is intended to be *retrospective* in nature. It should be distinguished from the companion Order Instituting Investigation 84-041-OII, also issued this date, which is designed to examine *prospectively* the alternatives and remedies that may be available to the Commission and the State of Arkansas in grappling with the various possible outcomes of the Grand Gulf and System Agreement cases as they proceed through FERC and the federal courts. As the product of both investigations, the Commission expects to issue a report and declaration of the facts which will be provided to the Governor, the General Assembly, and the public as a foundation for the discussion of possible remedial state legislation to protect the interests of the residential, business, and industrial customers of AP&L and preserve the viability of the economy of the State of Arkansas.

Therefore, pursuant to the powers vested in this Commission under Ark. Stat. Ann. §§ 73-202 and 73-218 (Repl. 1979),

IT IS ORDERED THAT:

1. This Commission hereby initiates investigation into the operation of Arkansas Power & Light Company as a subsidiary of Middle South Utilities, Inc.

2. All interested persons shall submit Preliminary Comments suggesting particular questions or avenues of inquiry on or before Monday, April 2, 1984. Such Preliminary Comments may be in the form of statements or letters to the Commission and should reference Docket 84-041-OII. They may be mailed to the Secretary of the Commission at P.O. Box C-400, Little Rock, AR 72203.

3. A hearing in this Docket shall be held at 9:00 A. M., on Tuesday, May 8, 1984, in the Commission Hearing Room, First Floor of the new Public Service Commission Building, 10th & Center Streets, Little Rock, Arkansas.

BY ORDER OF THE COMMISSION

This 12th day of March, 1984.

/s/ Robert E. Johnston,
Dr. Robert E. Johnston, Chairman

/s/ James W. Daniel
James W. Daniel, Commissioner

/s/ Patricia S. Qualls
Patricia S. Qualls, Commissioner

/s/ Amy Brooks
Secretary to the Commission

I hereby certify that the foregoing order issued by the Arkansas Public Service Commission has been served on all parties of record this date, by U.S. Mail with postage prepaid, being the address of each party as indicated in the official docket file.

/s/ Amy Brooks date 3-12-84
Secretary of the Commission

PART D

ARKANSAS PUBLIC SERVICE COMMISSION

DOCKET No. 84-041-0II

ORDER NO. 1

IN THE MATTER OF AN INVESTIGATION INTO THE EFFECT ON RETAIL RATES CHARGED BY ARKANSAS POWER & LIGHT COMPANY OF FEDERAL ENERGY REGULATORY COMMISSION DECISIONS INVOLVING MIDDLE SOUTH UTILITIES AND THE ALTERNNATIVES AND REMEDIES AVAILABLE TO THE ARKANSAS PUBLIC SERVICE COMMISSION AND THE STATE OF ARKANSAS IN MITIGATION OF SUCH EFFECTS

ORDER INSTITUTING INVESTIGATION

On February 3, 1984, an administrative law judge of the Federal Energy Regulatory Commission (FERC) issued an initial Decision Concerning Sales of Power From the Grand Gulf Nuclear Generating Plant in FERC Docket No. ER82-616-000 (hereinafter referred to as "the Grand Gulf case"). The effect of this decision, should it be affirmed by the full FERC and the courts, would be to increase rates to Arkansas Power & Light Company (AP&L) customers by approximately $310 million in 1985 and by similar (but, perhaps, declining) amounts in subsequent years. The Grand Gulf case and a second case, also filed by a subsidiary of Middle South Utilities, Inc., and styled *Middle South Services, Inc.*, in FERC Docket No. ER82-483-000 (known as "the System Agreement case"), together present the stark specter of rate increases to AP&L customers of $3.5 billion or more during the next ten years.

Increases of such magnitude would translate into rate hikes in the range of 40% on an annual basis for all classes of AP&L customers.

The intolerable burden such dramatic increases would place on the customers of AP&L and the crippling effect they would have on the economy of Arkansas necessitate that the Arkansas Public Service Commission conduct a searching inquiry into the alternatives and remedies that may be available to the Commission, AP&L, and the State of Arkansas acting through the Governor and the General Assembly in addressing this stunning prospect. Therefore, the Commission has determined to initiate an investigation into all possible options that may be within reach, lawful, and effective in protecting the interest of the residential, business, and industrial ratepayers of AP&L and preserving the competitiveness and viability of the State's economy.

The procedure to be followed in this 0II Docket will mirror that in 64-040-0II which is a retrospective inquiry into the events which have led up to the dilemma with which the Commission and the State of Arkansas are now faced as the result of the recent developments in the two FERC cases. This investigation, however, will look forward to ascertain what the ratepayers of AP&L, AP&L itself, the Commission, the Governor, and the General Assembly may do to circumvent or deflect the economic harm that looms over the State from the imminent prospect of being mandated by a federal agency to pay for a power generating plant that is possibly neither needed or wanted by anyone in Arkansas, for which a certificate of need appears never to have been sought by AP&L nor granted by

this Commission, and that would, if forced upon the State, potentially result in such immense amounts of excess generating capacity that it could neither be used nor sold by AP&L.

As a first step in conducting this investigation, the Commission hereby issues an invitation to all interested persons, including AP&L and its customers of all classes, to submit preliminary comments concerning the specific options and remedies which should be examined by the Commission in this inquiry. All such preliminary comments should be received by the Commission no later than Monday, April 2, 1984. These comments may be submitted informally, in writing, in the form of statements or letters to the Secretary of the Commission.

After conducting a review of the preliminary comments, the Commission will issue an Order more specifically focusing the investigation, posing questions, and requesting information. At that time a schedule for the filing of testimony and/or responses by AP&L and other interested persons will be established and a date for the commencement of hearings, which will be held from time to time as we deem necessary, will be set.

At the conclusion of this investigation, the Commission expects to issue a report and declaration of the facts concerning the alternatives evaluated which will be provided to the Governor, the General Assembly, and the public. Such findings of fact are intended to be aids to the consideration of legal and legislative action that may become necessary in the future to deal with the problems presented by the FERC cases.

In preparing preliminary comments, the Commission urges all interested persons to address matters outside of the subject of the legal proceedings and appeals of the FERC decisions, since all Arkansas parties to those cases are already diligently pursuing this alternative.

THEREFORE, pursuant to the powers vested in this Commission under Ark. Stat. Ann. §§73-202 and 73-218 (Repl. 1979),

IT IS ORDERED THAT:

1. This Commission hereby initiates an investigation into the effect on retail rates charged by Arkansas Power & Light Company of Federal Energy Regulatory Commission decisions involving Middle South Utilities, Inc., and the alternatives and remedies available to the Arkansas Public Service Commission and the State of Arkansas in mitigation of such effects.

2. All interested persons shall submit Preliminary Comments suggesting particular questions or avenues of inquiry in this docket on or before Monday, April 2, 1984. Such Preliminary Comments may be in the form of statements or letters to the Commission and should reference Docket 84-040-0II. They should be mailed to the Secretary of the Commission at P. O. Box C-400, Little Rock, AR 72203.

By ORDER OF THE COMMISSION

This 12th day of March, 1984.

/s/ Robert E. Johnston, Chairman
/s/ James W. Daniel, Commissioner
/s/ Patricia S. Qualls, Commissioner

/s/ Amy Brooks
Secretary to the Commission

(Stamp)

PART E

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U. M. ROSE
1834-1913

September 10, 1985

Mr. Robert D. St. Vrain, Clerk
8th Circuit Court of Appeals
511 U.S. Court and Customs House
St. Louis, Missouri 63101

Re: Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al., Nos. 84-2356-EA, 84-249, 84-2410 and 84-2480.

Dear Mr. St. Vrain:

On September 6, 1985, we filed on behalf of Appellants a Petition for Rehearing by Panel and Suggestion for Rehearing En Banc.

By agreement with Appellees, we request that our Petition be withdrawn from consideration. Thank you for your attention in this matter.

Yours very truly,

/s/ Carol S. Arnold

csa:jm

cc: Mr. Michael Thompson
Mr. Jerry D. Jackson
Mr. Steve L. Riggs
Mr. Robert Wood
Mr. Jay T. Youngdahl
Mr. Louis H. Willenken
Mr. N. M. Norton, Jr.

PART F

ARKANSAS PUBLIC SERVICE COMMISSION

DOCKET NO. 84-190-U
ORDER NO. 5

IN THE MATTER OF AN ORDER FOR ARKANSAS POWER & LIGHT COMPANY TO APPEAR AND SHOW CAUSE WHY CERTAIN AGREEMENTS SHOULD NOT BE HELD TO BE VOID *AB INITIO*

O R D E R

Pursuant to the "Stipulation and Settlement Agreement" filed in Docket No. 84-249-U on September 5, 1985, and the Commission's Order No. 26 entered in said docket on September 9, 1985, the Secretary of the Commission is hereby directed to close the above-styled docket effective as of the date of this order.

BY ORDER OF THE COMMISSION

This 20th day of September, 1985.

/s/ Dr. Robert E. Johnston,
Chairman

/s/ James W. Daniel, Commissioner

/s/ Patricia S. Qualls, Commissioner

/s/ Vertina Burris acting
Melinda Mills
Secretary of the Commission

(Stamp)